United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 9279

AT LAW.

ELIAS A. OLSON, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

No. 9280

AT LAW.

RANDOR G. KARLSON, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

No. 9281

AT LAW.

HARRY BREWSTER, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED AUGUST 10, 1931.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1933, of said Court, before the Honorable Kimbrough Stone and the Honorable Wilbur F. Booth, Circuit Judges, and the Honorable A. Lee Wyman, District Judge.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the tenth day of August, A. D. 1931, a transcript of record pursuant to appeals allowed by the District Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein Elias A. Olson was Appellant and the United States of America was Appellee, and wherein Randor G. Karlson was Appellant and the United States of America was Appellee, and wherein Harry Brewster was Appellant and the United States of America was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

United States District Court, District of Minnesota, Sixth Division.

Transferred to Fifth Division.

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondent.

In the matter of the Appeal of United States of America, Petitioner, and of Harry Brewster, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tracts and easements numbered 247, 248 and 252, as set forth in said award.

And

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner, and of Randor G. Karlson, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86 and 87, as set forth in the said award.

And

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, petitioner, and of Elias A. Olson, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

2 Appearances.

Lewis, Hunt & Palmer, Duluth, Minnesota.

C. E. Berkman, Chisholm, Minnesota.

John A. Hougen, Crookston, Minnesota.

Lewis L. Drill, United States Attorney, St. Paul, Minnesota.

Donald D. Harries, Special Assistant United States Attorney, Duluth, Minnesota.

D. N. Lindeman, of United States War Department, Duluth, Minnesota.

Chester S. Wilson, Assistant Attorney General of Minnesota, St. Paul, Minn.

T. L. Corey, Counsel for Dominion of Canada, Ottawa, Canada.

Pleas in the United States District Court, District of Minnesota, Fifth Division, in the above entitled cause.

Be It Remembered that on the 19th day of July, A. D. 1929, there was filed in the office of the clerk of said court, at his office in the City of Fergus Falls, said District and Sixth Division thereof, and thereafter transferred to his office in the city of Duluth, Minnesota, said District and Fifth Division thereof, Petition in Condemnation Proceedings, which is in words and figures following, to-wit:

3 I.

Petition in Condemnation Proceedings.

In the District Court of the United States for the District of Minnesota, Sixth Division.

United States of America, Petitioner,
539 vs. Law.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Harry Brewster, Randor G. Karlson, Elias A. Olson, Respondents, et al.

Now Comes The United States of America and petitions this Honorable Court and alleges:

I.

That heretofore, on the 24th day of February, 1925, the United States entered into and concluded a convention and

protocol with his Brittanic Majesty in respect of the Dominion of Canada for regulating the level of the Lake of the Woods and certain of the waters tributary thereto. That in Article 8 of said treaty, it was provided:-

"Article 8.

A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement."

That thereafter and on or about the 17th day of July, 1925, the said treaty was approved by the Senate of the United States and promulgated by the President.

II.

Thereafter, by an Act of Congress approved by the President May 22nd, 1926, amended by an act of Congress approved by the President April 18th, 1928, it was provided that the Secretary of War acquired by purchase or
4 condemnation in accordance with the provisions of An Act of Congress entitled "An act to authorize condemnation of land for sites of public buildings, and for other purposes", approved August 1, 1888, and in accordance with the constitutional provisions of the State of Minnesota which provide that private property shall not be taken, destroyed or damaged for public use without just compensation therefor first paid or secured, the flowage easements up to elevation one thousand and sixty-four sea-level datum upon all lands in such State bordering on the Lake of the Woods, Warroad River, and Rainy River, and such lands or interests therein as are necessary to provide for the protective works and measures in such State along the shores of the Lake of the Woods and the banks of the Warroad and Rainy Rivers.

III.

That thereafter and prior to the 26th day of January, 1928, the Secretary of War of the United States endeavored to acquire by purchase the flowage rights referred to in said Convention and hereinafter described, but was unable to do so because of unreasonable prices demanded by the owners thereof or the unsatisfactory condition of the titles thereto, and on the 26th day of January and the 16th day of May, 1928, requested the Attorney General of the United States to acquire such flowage rights by condemnation proceedings

in accordance with said Act of Congress, and in pursuance to said request the Attorney General of the United States has directed the United States Attorney for the District of Minnesota, in which lie all of the lands upon which easements are so to be acquired, to institute condemnation proceedings to acquire a flowage easement up to elevation 1064 sea-level datum.

IV.

That the raising of the level of said Lake and the waters tributary thereto as provided for in said Convention, and the acquirement of the flowage easements necessitated by said Convention and provided for therein and in the said Acts of Congress will affect the tracts of land hereinafter described upon all of which this petitioner in order to fulfill its obligations under said treaty seeks hereby to acquire forever the full, complete and perpetual right, power and privilege to over-flow all that portion thereof which lies below elevation 1064 sea-level datum and which would be overflowed by a raising of the water in the said lake to that datum, be the consequences thereof to said tracts what they may. The term "sea-level datum" as used herein and in the aforesaid Convention means the datum permanently established by the International Joint Commission at the town of Warroad, Minnesota, as represented by the following bench mark: "Top of copper plug in concrete block carried below frost line, and located near fence in front of and to the west of new schoolhouse. Established October 3, 1912. Elevation, sea-level datum, 1068.797."

That the Engineers of the United States Army, acting for the Secretary of War, have numbered the tracts of land subject to over-flow by the Lake of the Woods and its tributary streams when raised as authorized by said Convention, and for convenience of reference, the said tracts are herein numbered with the same numbers as those adopted by the said Engineers.

V.

That the following are tracts of land so affected and so to be subjected to flowage easement with the names of the owners appearing of record or known to this petitioner as defined by the Statutes of the State of Minnesota and upon all of which a flowage easement is required up to sea-level datum 1064 as herein defined:

Easement	Description of Tract affected	Approximate acres thereof below elevation 1064	Owner
********			
Nos. 86 and 87.	Lots One (1) and Two (2) and the South half (S½ of the Northeast quarter (NE¼) of Section 5 (5), Township One hundred sixty-two (162), North of Range Thirty-five (35)	163.65	Randor G. Karlson The State of Minnesota and the County of Roseau and the Township of Laona claim liens upon said premises on account of unpaid taxes thereon and the County of Roseau also claims a lien thereon for a ditch assessment.
* * * *			
No. 147	Lots One (1) and Two (2) and the Southwest Quarter (SW¼) of the Northwest Quarter (NW¼) of Section Twenty-five (25), and Lot One (1) and the Southeast Quarter (SE¼) of the Northeast Quarter (NE¼) of Section Twenty-six (26), Township One Hundred Sixty-eight (168) North of Range Thirty-four (34)	55.21	Elias A. Olson By homestead entry only.
* * * *			
No. 247	Lot Three (3) of Section Twenty-six (26), Township One Hundred sixty-six (166) North of Range Thirty-five (35)	32.15	Harry Brewster By homestead entry only
No. 248 & 252	Lot Four (4) and the Southeast quarter (SE¼) of the southeast quarter (SE¼) of Section Twenty-six (26), Lot One (1) and the Northeast quarter (NE¼) of the Northeast quarter (NE¼) of Section Thirty-five (35), Township One Hundred sixty-six (166), North of Range Thirty-five (35)	66.4	Harry Brewster
* * * * *			

Wherefore, Your Petitioner prays for a judgment in these proceedings that it acquire the perpetual easement, right and privilege as against all the respondents and against all per-

sons or parties whatsoever, to overflow all that part of
7 the lands hereinbefore described up to elevation 1064 sea-level datum and which would be overflowed by a raising of the level of the Lake of the Woods to that level; that such shall be determined to be necessary and authorized by law; that three disinterested commissioners be appointed by this court to ascertain and report the amount of damages that will be sustained by the several owners on account of such taking; that said order fix the time and place of the first meeting of said commissioners and prescribe their compensation and direct that they proceed according to law and with all convenient speed to make a separate assessment and award of damages which will result to each of the owners of the tracts of land above described by reason of such taking and report the same to this court under their hands. That the court make suitable provision for satisfying or otherwise disposing of all tax liens and assessments, mortgages, judgments and other incumbrances upon and interests in said lands, and in all cases where for any reason it be doubtful to whom the award should be paid, that it be paid to the Clerk of this Court to be paid out under direction of this Court, and for such other relief as may be appropriate in the premises.

Dated July 18, 1928.

(Signed) CHARLES LORING,
Special Assistant United States Attorney,
District of Minnesota, Polk County, State Bank Building, Crookston, Minnesota.

Endorsed: Filed July 19, 1928, Joel M. Dickey, Clerk, By L. A. Levorsen, Deputy.

Order Allowing Amendment of Petition.

8 In the District Court of the United States for the District of Minnesota—Sixth Division.

United States of America, Petitioner,
539 vs. Law
Various Tracts of Land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al, Respondents.

This matter came regularly on for hearing by the Court at a Special Term thereof held in the Federal Building in the City of Saint Paul, on October 27, 1930, at 2 o'clock P. M., pursuant to adjournment from the morning session of

the Court. The motion before the Court was on the part of the United States for leave to amend the petition herein. Lewis L. Drill, United States Attorney, Donald D. Harries, Special Assistant United States Attorney, and D. N. Lindeman, Esquires, appeared on behalf of the United States; T. L. Cory, Esquire, appeared on behalf of the government of Canada; I. K. Lewis, Julius J. Olson and C. E. Berkman, Esquires, appeared on behalf of certain respondents.

The Court having heard argument and being advised in the premises

It is ordered, that the petition herein may be and is hereby amended by striking therefrom paragraphs I, II, III,
9 IV and X and the prayer for relief, and in lieu thereof substituting the paragraphs set forth in the attached amended petition so that the petition of the United States of America as amended shall read as shown on the attached amended petition, plus the names of parties, descriptions of lands affected and acreage below elevation 1064 sea-level datum as alleged in the original petition.

By the Court.

JOHN B. SANBORN,
Judge.

Dated at St. Paul, Minnesota, this 6th day of December, 1930.

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10 Amended Petition.

In the District Court of the United States for the District of Minnesota—Sixth Division.

United States of America, Petitioner,
vs. Law 539
Various Tracts of Land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al, Respondents.

Now comes the United States of America and petitions this Honorable Court and alleges:

I.

That heretofore on the 24th day of February, 1925, The United States entered into and concluded a convention and protocol with his Brittanic Majesty in respect of the Dominion of Canada for regulating the level of the Lake of the

Woods and certain of the waters tributary thereto. That in said treaty it was provided:

"The level of the Lake of the Woods shall ordinarily be maintained between elevations 1056 and 1061.25 sea-level datum, and between these two elevations the regulations shall be such as to ensure the highest continuous uniform discharge of waters from the lake.

"During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea-level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062.5 sea-level datum."

That thereafter and on or about the 17th day of July, 1925, the said treaty was approved by the Senate of the United States and promulgated by the President.

II.

Thereafter, by an Act of Congress approved by the
11 President May 22, 1926, amended by an Act of Congress approved by the President April 18, 1928, it was provided that the Secretary of War acquire by purchase or condemnation in accordance with the provisions of an Act of Congress entitled "An Act to authorize condemnation of land for sites for public buildings, and for other purposes", approved August 1, 1888, and in accordance with the constitutional provisions of the State of Minnesota which provide that private property shall not be taken, destroyed or damaged for public use without just compensation therefor first paid or secured, the flowage easements up to elevation one thousand and sixty-four sea-level datum, as defined by and in accordance with and for the purpose of carrying out the provisions of said treaty, upon all lands in such State bordering on the Lake of the Woods, Warroad River and Rainy River, and such lands or interests therein as are necessary to provide for the protective works and measures in such State along the shores of the Lake of the Woods and the banks of the Warroad and Rainy Rivers.

III.

That thereafter and prior to the 28th day of October, 1929, the Secretary of War of the United States endeavored to acquire by purchase the flowage rights referred to in said Convention and hereinafter described, but was unable to do so because of unreasonable prices demanded by the owners thereof or the unsatisfactory condition of the titles thereto,

and has requested the Attorney General of the United States to acquire such flowage rights by condemnation proceedings in accordance with said Acts of Congress, and in pursuance to said request the Attorney General of the United States has directed the United States Attorney for the District of Minnesota, in which lie all the lands upon which easements are so to be acquired, to institute condemnation proceedings to acquire a flowage easement up to elevation 1064 sea-
12 level datum, as defined by and in accordance with and for the purpose of carrying out the provisions of said treaty.

IV.

That the raising of the level of said lake and the waters tributary thereto as provided for in said Convention, and the acquirement of the flowage easements necessitated by said Convention and provided for therein and in the said Acts of Congress, will affect the tracts of land hereinafter described, upon all of which this petitioner in order to fulfill its obligations under said treaty seeks hereby to acquire forever the full, complete and perpetual right, power and privilege to raise and regulate the levels of the Lake of the Woods in accordance with the provisions of the aforesaid treaty and in consequence of which to overflow and otherwise affect the lands hereinafter described by such raising and regulation of said waters in accordance with said treaty, be the consequences thereof to said tracts what they may. The term "sea-level datum" as used herein and in the aforesaid Convention means the datum permanently established by the International Joint Commission at the town of Warroad, Minnesota, as represented by the following bench mark: "Top of copper plug in concrete block carried below frost line, and located near fence in front of and to the west of new schoolhouse. Established October 3, 1912. Elevation, sea-level datum, 1068.797".

That the Engineers of the United States Army, acting for the Secretary of War, have numbered the tracts of land subject to overflow by the Lake of the Woods and its tributary streams when raised as authorized by said Convention, and for convenience of reference, the said tracts are herein numbered with the same numbers as those adopted by the said Engineers.

V.

That the following are tracts of land so affected and
13 so to be subjected to flowage easement with the names of the owners appearing of record or known to this

petitioner as defined by the Statutes of the State of Minnesota and upon all of which a flowage easement is required up to sea-level datum 1064 as herein defined.

X.

That the Village of Warroad, the Counties of Roseau and Lake of the Woods and the Townships of Moranville and Laona in Roseau County and the Township of Angle in Lake of the Woods County have highways and other real estate which will be subjected to overflow by raising of the level of said lake as provided for in said treaty and it is hereby sought to subject said highways and other property to a perpetual easement for such overflow.

XI.

That the State of Minnesota has a trunk highway known as Trunk Highway No. 11, which crosses the Village of Warroad, and the Townships of Moranville and Laona, a part of which lies below 1064 sea-level datum and will be overflowed by the raising of said lake, as herein stated, and it is hereby sought to subject said highway to a perpetual easement for such overflow.

XII.

That there may be respondents above named, who, unknown to this Petitioner, have deceased, and there may be other unknown persons who claim an interest in any or all of said lands, and in order that the rights and interests of such heirs and other persons may be subjected to the easement sought by the petitioner they are made parties hereto.

Wherefore, your petitioner prays for a judgment in these proceedings that it acquire the perpetual easement right and privilege as against all the respondents and against all persons or parties whomsoever to raise and regulate the levels of the Lake of the Woods in accordance with the provisions of the aforesaid treaty and in consequence of which
14 to overflow and otherwise affect the lands hereinbefore described by such raising and regulation of said waters in accordance with said treaty, be the consequences thereof to said tracts what they may; that such shall be determined to be necessary and authorized by law; that three disinterested Commissioners be appointed by this Court to ascertain and report the amount of damages which will be sustained by the several owners on account of such taking; that said order fix the time and place of the first meeting of said Commissioners and prescribe their compensation and direct

that they proceed according to law and with all convenient speed to make a separate assessment and award of damages which will result to each of the owners of the tracts of land above described by reason of such taking and report the same to this Court under their hands. That the Court make suitable provision for satisfying or otherwise disposing of all tax liens and assessments, mortgages, judgments and other incumbrances upon and interest in said lands, and in all cases where for any reason it is doubtful to whom the award should be paid, that it be paid to the Clerk of this Court, to be paid out under direction of this Court; and for such other relief as may be appropriate in the premises.

LEWIS L. DRILL,
United States Attorney, Federal Building, Saint Paul, Minnesota.

DONALD D. HARRIES,
Special Assistant U. S. Attorney, 1200 Alworth Building, Duluth, Minnesota.

Endorsed: Filed Dec. 10, 1930. Joel M. Dickey, Clerk. By J. L. Ketten, Deputy Clerk.

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15 Order Appointing Commissioners and Fixing Time and Place of Their First Meeting.

This matter having come duly on to be heard before the Court on notice and petition for the appointment of commissioners to appraise the damages which may be occasioned by the taking sought in the petition on file herein, Charles Loring, Esq., of Crookston, Minnesota, appearing as attorney for the petitioner, and T. L. Cory, Esq., of Ottawa, Canada, appearing for the Government of Canada, and E. C. Middleton, Esq., of Baudette, Minnesota, and C. E. Berkman, Esq., of Chisholm, Minnesota, appearing for various respondents herein; E. H. Morphy, Esq., Hector Baxter, Esq., for Canadian National Railway Company, Canadian Northern Railway Company, and Minnesota and Manitoba Railroad Company. Mr. A. L. Janes, Esq., by E. H. Morphy and Messrs. Baldwin, Baldwin, Holmes and Mayall for the Great Northern Railway Company, and the Minnesota & Great Northern Railway Company, A. G. Cherne for Emily Cugnet, Mr. A. M. Landby for School District number 12, Bert Hanson, Esq., for Joseph Berlinger, who also appeared personally; and Mr. Hans R. Selvog appeared personally, and upon due proof being filed of the service of notice of this hearing and it ap-

pearing to the Court that the taking sought in the petition is necessary and authorized by law,

It Is Ordered That the following named persons, residents of the Sixth Division in the District of Minnesota, namely Nels S. Hegnes of Argyle, Minnesota, Wm. M. Taber of Park Rapids, Minn. and G. I. Brandt, of Roseau, Minnesota, be, and the same hereby are, appointed commissioners to ascertain and report the amount of damages that will be sustained by the several owners of the tracts described in the petition on account of such taking. The First meeting of said commissioners shall take place on the 25th day of September, 1928, at 9:00 o'clock A. M., of said day, at the Court Room in the Federal Building in the city of Duluth, in the District of Minnesota.

It Is Further Ordered, that the compensation of each of said commissioners, including the amount which shall be allowed him for maintenance is hereby fixed at the sum of $20.00 per day for each day actually devoted to the work of such commission under this Order. In addition to the above compensation each commissioner shall be allowed his actual expenses incurred, and paid for transportation in performing his duties under this Order, including his expenses in coming to the City of Duluth for the first meeting of said commissioners on Tuesday, September 25th, 1928, and returning to his home therefrom, or going to such place as may be necessary for the further performance of his duties. All per diem charges and other items shall be approved by this court.

Dated at Duluth, Minnesota this 25th day of September, 1928.

This order and the foregoing appointments are made pursuant to the consent of the Government of the United States and of all respondents represented by Mr. C. E. Berkman and Mr. E. C. Middleton.

By the Court:

WM. A. CANT,
United States District Judge.

Endorsed: Filed September 25, 1928, Joel M. Dickey, Clerk, By L. A. Levorsen, Deputy.

17

III.

Report and Award of Commissioners.

To the court above named:

The undersigned Commissioners, appointed by this Court in the above entitled matter by order dated September 25th, 1928, do hereby report as follows:

1.

That on said 25th day of September, 1928, we qualified according to law and took and subscribed an oath as required by Statute and we met at the time and place appointed by the Court therefor, to-wit, at the Court Room in the Federal Building in the city of Duluth on said 25th day of September, 1928, and from there we adjourned from time to time and place to place giving the notice of such adjournment required by Statute and we carefully viewed and inspected each piece of land described in the petition and heard testimony publicly under oath, in regard to such land.

2.

We also report that we have appraised and assessed the damages to each of said tracts of land caused by the imposition of the easement thereon as sought by the petitioner, and have made an award of such damages as to each tract. That many of the parties to whom the award of damages should be made are not residents of the State and their place of residence is in some cases unknown to us and in some cases there are infants or persons under legal disability who own or claim some interest in the premises, and in many cases there are tax liens and other encumbrances, and in all cases we are doubtful to whom the award of damages should be paid and in consequence thereof we have made the award in gross as to each contiguous tract of land which is apparently under one ownership and used for a single purpose, so that the petitioner may pay such award to the Clerk of the above named Court to be paid out under the direction of the Court.

18

3.

We therefore find and award as damages to each tract of land herein described as a consequence of the easement imposed thereon by these proceedings the sum set opposite the number and description of such tract of land, the said award to be distributed to the owners, encumbrancers, lienors and occupants according to their respective interests in said premises and the priorities with respect thereto and in the absence of agreement under the direction of the Court;

19 Easement	Description of tract affected	Amount of Award
* * * *		
Nos. 86 and 87	Lots One (1) and Two (2), and the South half (S½) of the Northeast quarter (NE¼) of Section five (5), Township one hundred sixty-two (162), North of Range thirty-five (35) West.	The sum of $3660.00
* * * *		
No. 147	Lots One (1) and Two (2) and the Southwest quarter (SW¼) of the Northwest quarter (NW¼) of Section Twenty-five (25), and Lot One (1) and the Southeast quarter (SE¼) of the Northeast quarter (NE¼) of Section Twenty-six (26), Township one hundred sixty-eight (168); North of Range thirty-four (34) West.	The sum of $1296.50 The sum of $40.00 for damage to Dock and Wharf is included in the above.
* * * *		
No. 247	Lot Three (3) of Section twenty-six (26), Township one Hundred Sixty-six (166), North of Range Thirty-five (35) West.	The sum of $640.70
No. 248 & 252	Lot Four (4) and the Southeast quarter (SE¼) of the Southeast quarter (SE¼) of Section twenty-six (26), Lot One (1) and the Northeast quarter (NE¼) of the Northeast quarter (NE¼) of Section Thirty-five (35), Township One Hundred sixty-six (166), North of Range thirty-five (35) West.	The sum of $3195.80
* * *		

NELS S. HEGNES
WM. M. TABER
G. I. BRANDT
Commissioners

Dated May 4, 1929.

Endorsed: Filed May 4, 1929, Joel M. Dickey, Clerk, By Frances V. Levorsen, Deputy.

IV.

Notice of Appeal by Petitioner From the Award of Said Commissioners Made in Connection With Easements 86-87, 147, 247, and 248-252.

To the Clerk of the above named Court and

To the respondents above named who are interested as owners or otherwise in the tracts and awards hereinafter described and to the occupants of said tracts.

You Will Please Take Notice That the United States of America, the petitioner above named, hereby appeals from the awards of damages hereinafter set out and which awards were made by the Commissioners heretofore appointed in this proceeding to appraise and report the damages to the various tracts of land involved herein on account of the easement sought by the Petitioner and whose report was filed herein on the 4th day of May, 1929, and notice of the filing thereof delivered to the Petitioner on the 5th day of May, 1929, and which said awards of damages are appealed from on the ground that they and each of them as hereinafter set out are excessive and that each award exceeds the actual legal damage to the tract in favor of which it is assessed by the the said Commissioners in their report and opposite which, as hereinafter specifically described, such award is set out.

Each award appealed from, together with the specific description of the property and the number of the easement as set out in the petition in favor of which the award was made, is as follows:

Easement	Description	Award
Nos. 86 and 87	Lots One (1) and Two (2), and the South half (S½) of the Northeast quarter (NE¼) of Section Five (5), Township One hundred sixty-two (162), North of Range Thirty-five (35) West.	$3,660.00
No. 147	Lots One (1) and Two (2), and the Southwest Quarter (SW¼) of the Northwest quarter (NW¼) of Section Twenty-five (25), and Lot One (1), and the Southeast quarter (SE¼) of the Northeast quarter (NE¼) of Section twenty-six (26), Township One Hundred sixty-eight (168), North of Range Thirty-four (34) West.	$1,296.50 The sum of $40.00 for damage to Dock and Wharf is included in the above.

No. 247	Lot Three (3) of Section Twenty-six (26), Township One hundred sixty-six (166), North of Range Thirty-five (35) West.	$640.70
Nos. 248 and 252	Lot Four (4) and the Southeast Quarter (SE¼) of the Southeast quarter (SE¼) of Section twenty-six (26), Lot One (1) and the Northeast quarter (NE¼) of the Northeast quarter (NE¼) of Section Thirty-five (35), Township One Hundred sixty-six (166), North of Range Thirty-five (35) West.	$3,195.80

For the petitioner,

(Signed) LEWIS L. DRILL
United States Attorney,
St. Paul, Minnesota.

(Signed) CHARLES LORING
Special Assistant United States Attorney, Crookston, Minnesota.

Endorsed: Filed June 3, 1931, Joel M. Dickey, Clerk, By Frances V. Levorsen, Deputy.

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22 V.

Notices of Appeal from the Award of Said Commissioners Filed by Respondent Randor G. Karlson.

#86 and 87

To the United States of America, the petitioner in the above entitled proceedings:

You will please take notice that Randor G. Karlson, et al., one of the parties herein appeals to the District Court of the United States, for the District of Minnesota, 6th Division, from the award of $3660.00 made by the Commissioners in the above entitled proceedings made to Randor G. Karlson as the owner of the following described property:

Easement No. 86 and 87

Lots 1 and 2, and S½ of NE¼, Sec. 5, T. 162, R. 35.

Randor G. Karlson alleges that he was at the time of the institution of the proceedings herein, the owner in fee simple, of the said property and ever since has been the owner thereof.

The grounds of this appeal are that the award of $3600.00 for the taking of a flowage easement in the above described property is grossly inadequate.

The nature of his claim is that he has sustained damages by the taking of said property in the sum of $8000.00 and the amount of his claim for the taking is last named sum.

The report of the commissioners in making the award herein referred to was filed in the above Court on May 5th, 1929.

Dated at Chisholm, Minn. June 5, 1929.

(Signed) RANDOR KARLSON,
Owner.

(Signed) C. E. BERKMAN,
Attorney for owner of the above described property.

Endorsed: Filed June 19, 1929. Joel M. Dickey, Clerk. By Frances V. Levorsen, Deputy.

23

V.

Notices of Appeal from the Award of Said Commissioners Filed by Respondent Elias A. Olson.

147

To the United States of America, the petitioner in the above entitled proceedings:

You will please take notice that Elias A. Olson, one of the parties herein appeals to the District Court of the United States, for the District of Minnesota, 6th Division, from the award of $1296.50 made by the Commissioners in the above entitled proceedings made to Elias A. Olson as the owner of the following described property:

Easement No. 147

Lots 1 and 2 and SW¼ of NW¼ of Sec. 25, and Lot 1 and SE¼ of NE¼ of Sec. 26, T. 168, R. 34.

Elias A. Olson alleges that he was at the time of the institution of the proceedings herein, the owner by homestead entry, of the said property and ever since has been the owner thereof.

The grounds of this appeal are that the award of $1296.50 for the taking of a flowage easement in the above described property is grossly inadequate.

The nature of his claim is that he has sustained damages by the taking of said property in the sum of $3500.00 and the amount of his claim for the taking is last named sum.

The report of the commissioners in making the award herein referred to was filed in the above Court on May 5th, 1929.

Dated at Chisholm, Minn.

ELIAS A. OLSON, Owner,

C. E. BERKMAN,
Attorney for owner of the above described property.

Endorsed: Filed Apr. 28, 1931. Joel M. Dickey, Clerk. By Frances V. Levorsen, Deputy.

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24 V.

Notices of Appeal from the Award of Said Commissioners Filed by Respondent Harry Brewster.

No. 247

To the United States of America, the petitioner in the above entitled proceedings:

You will please take notice that Harry Brewster, one of the parties herein appeals to the District Court of the United States, for the District of Minnesota, 6th Division, from the award of $640.00 made by the Commissioners in the above entitled proceedings made to Harry Brewster as the owner of the following described property:

Easement No. 247

Lot 3 of Sec. 26, T. 166, R. 35

Harry Brewster alleges that he was at the time of the institution of the proceedings herein, the owner by homestead entry, of the said property and ever since has been the owner thereof.

The grounds of this appeal are that the award of $640.00 for the taking of a flowage easement in the above described property is grossly inadequate.

The nature of his claim is that he has sustained damages by the taking of said property in the sum of $2000.00 and the amount of his claim for the taking is last named sum.

The report of the commissioners in making the award herein referred to was filed in the above Court on May 5th, 1929.

Dated at Chisholm, Minn.

(Signed) HARRY BREWSTER,
Owner.

(Signed) C. E. BERKMAN,
Attorney for owner of the above described property.

Endorsed: Filed Jun. 10, 1929, Joel M. Dickey, Clerk. By Frances V. Levorsen, Deputy.

25

V.

Notices of Appeal from the Award of Said Commissioners Filed by Respondent Harry Brewster.

248
(and 252)

To the United States of America, the petitioner in the above entitled proceedings:

You will please take notice that Harry Brewster, one of the parties herein appeals to the District Court of the United States, for the District of Minnesota, 6th Division, from the award of $3195.00 made by the Commissioners in the above entitled proceedings made to Harry Brewster as the owner of the following described property:

Easement No. 248

Lot 4 and SE¼ of SE¼ of Sec. 26, Lot 1 and NE¼ of NE¼ of Sec. 35, T. 166, R. 35.

Harry Brewster alleges that he was at the time of the institution of the proceedings herein, the owner in fee simple, of the said property and ever since has been the owner thereof.

The grounds of this appeal are that the award of $3195.00 for the taking of a flowage easement in the above described property is grossly inadequate.

The nature of his claim is that he has sustained damages by the taking of said property in the sum of $7000.00 and the amount of his claim for the taking is last named sum.

The report of the commissioners in making the award herein referred to was filed in the above Court on May 5th, 1929.

Dated at Chisholm, Minn., June 5, 1929.

HARRY BREWSTER, Owner,

C. E. BERKMAN,
Attorney for owner of the above described property.

Endorsed: Filed Jun. 19, 1929. Joel M. Dickey, Clerk. By Frances V. Levorsen, Deputy.

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26 Bill of Exceptions

as amended by order of Court, Sanborn, J.

Dated July 30, 1931.

27 United States District Court, District of Minnesota, Sixth Division.

Transferred to 5th Division

Law #539

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Harry Brewster, Respondent-appellant, from the award of the Commissioners heretofore appointed herein in connection with the tracts and easements numbered 247, 248-252, as set forth in said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents

In the matter of the Appeal of United States of America, Petitioner-Respondent and of Randor G. Karlson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86-87, as set forth in the said award.

and

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Elias A. Olson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

28 Be It Known and Remembered That this action was brought on for trial at the regular term of said Court adjourned from the Sixth Division to the Third Division, by agreement between Court and counsel for the convenience of all parties, at the Federal Building, in the City of St. Paul on the 22nd day of January, 1931, before the Court, Hon. John B. Sanborn, District Judge presiding, and a jury. Messrs. C. E. Berkman, I. K. Lewis and John H. Hougen appeared on behalf of Respondents-Appellants, Chester S. Wilson, Esq., Assistant Attorney General appeared on behalf of the State of Minnesota, H. M. Ferroe, Esq., appeared on behalf of the Rural Credit Bureau, associated with Chester S. Wilson, Esq., Messrs. Lewis L. Drill, United States Attorney, and Donald D. Harries, Special Assistant United States Attorney appeared on behalf of the United States, D. N. Lindeman, Esq., of the United States War Department appeared on behalf of the United States, and T. L. Cory, Esq., appeared on behalf of the Dominion of Canada.

The cases being called for trial, by agreement of parties there was an order of the Court that said three cases be tried together, and that all evidence, and all offers of proof be regarded as having been offered and received in each of the three cases; and that only one record be made for all three cases, and that a separate verdict be returned in each case.

After the jury was regularly impaneled there was a statement by Donald D. Harries, Esq., Special Assistant United

States Attorney on behalf of the United States, and it was made to appear to the Court and Jury that the appeals involved herein arise out of condemnation proceedings brought by the United States to acquire by such condemnation proceedings a flowage easement up to contour 1064 sea level datum on respondent-appellant's lands, pursuant to Act of Congress approved by the President May 22, 1926, and
29 amended by an Act of Congress approved by the President April 18, 1928, which said Acts of Congress were enacted for the purposes of carrying into effect the Treaty of February 24, 1925, concluded between the United States and his Britannic Majesty in respect of the Dominion of Canada for regulating the level of the Lake of the Woods.

Commissioners were regularly appointed by the United States District Court pursuant to petition filed by the Government, awards of compensation and damage were filed by said commissioners, and appeals from said awards were conducted by the government and by respondents, owners of said lands. Said appeals were regularly brought on for trial, as stated on the foregoing page.

The principal question involved on said appeals was the measure of compensation and damage.

The United States, as petitioner, in order to make clear to the Court and Jury the location of the property on which the government seeks to acquire the easement in question called as a witness ADOLPH F. MEYER, who identified the level and outflow of the Lake of the Woods. That the Norman dam was completed in 1898 and that the stop logs were installed in November of that year. That the outflow and the level of the lake is regulated and determined by the number of stop logs that are placed in the sluices of the Norman Dam. That the regulation made possible by the Normal Dam has caused an average rise in the levels of the Lake of approximately three feet above the natural levels of the lake.

Mr. Meyer further testified that ever since the year 1898 when the Norman Dam was built the water of the Lake of the Woods has been controlled and raised to approximately the same extent as it is at the present time. That respondents' lands and all lands forming the Lake of the
30 Woods reservoir have been flooded throughout the years from 1898 to the present time to substantially the same extent as they will be flooded under the easement being acquired by the government, pursuant to treaty regu-

lations. That the flowage easement now being acquired by the Government has been imposed on respondents' lands, and on the shore lands of the Lake of the Woods ever since 1898 substantially as it will be in the future under the treaty regulation. That this condemnation proceeding by the Government is not a part of a development proposition for some project that is to come up in the future, but that it is a proceeding to condemn a flowage easement imposed upon the lands in question, ever since 1898.

That the use of respondents' lands for flowage purposes is absolutely necessary for the formation and operation of the reservoir contemplated by the International Joint Commission, and that all of the lands on which the government is condemning the flowage easement have formed a part of the Lake of the Woods reservoir ever since 1898.

Mr. Meyer further testified that it was a part of the function of the International Joint Commission to inquire into the different uses to which he lands adjoining the Lake of the Woods were adapted, and that such an inquiry was conducted. That Mr. Meyer himself investigated and considered the uses for which said lands were available and suited, and that he found that said lands were suited for two principal uses,—one for agriculture and the other a "use for flowage purposes". That the International Joint Commission considered which was the more valuable, and that Mr. Meyer gave a great deal of study and investigation to that question and reported thereon to the International Joint Commission. That he has made a study of quite a number of reservoirs, both in Minnesota and elsewhere, and that he considered himself competent to determine the most
31 valuable use to which said lands may be devoted. On that subject Mr. Meyer testified:

"It is my conclusion that the lands around the Lake of the Woods are more valuable for flowage purposes than for agricultural purposes. By that I mean that their use value is greater for reservoir purposes.

By Mr. Harries:

Q. Mr. Meyer, in speaking of the use to which the lands are to be put, and making a comparison of the value of such uses, do you have in mind the market value, or the value of the use, or what I might call the utility value, or the economic value, or could you explain that to us?

A. I have in mind the use value of the land.

Mr. Meyer further testified that it would not be possible to build a dam in the Lake of the Woods anywhere in the

United States that would in any way regulate the level of the lake, or create a reservoir in said lake in aid of navigation, because there is no outlet of the Lake of the Woods within the boundaries of the United States where it would be practicable to build a dam across the Lake of the Woods.

Mr. Meyer further testified:

"[A]. And for what purposes are the waters of the Lake of the Woods used primarily?

A. The waters themselves are primarily used for power development, for fishing, for navigation purposes, for the use of summer resorters, some for domestic and sanitary purposes. The City of Winnipeg gets its water supply from an arm of the Lake of the Woods."

That there were no power plants in the Winnipeg River before the Norman Dam was built. That the Norman Dam was built for power purposes, and that the Lake of the Woods storage reservoir was created for power purposes at that time.

That the Keewatin Power Company, a Canadian corporation, built the Norman Dam, and that its stockholders, for the most part, are citizens of the United States. That the control of the level and outflow of the Lake of the Woods is exercised exclusively by the Norman Dam.

Mr. Meyer testified also that so far as he knows no flowage easements have been bought or sold on the Lake of the Woods, as flowage easements.

32 Mr. Meyer was then asked to testify as to the power resources on the Winnipeg River and the relation of the Lake of the Woods thereto. There was an objection by the government to the introduction of any evidence tending to show that lands in question had any additional value because of the fact that they formed a part of the Lake of the Woods storage reservoir.

BERNHARD A. ARNESEN was called as a witness on behalf of the respondents. Immediately after this witness was sworn the government counsel asked leave of court to state the government's objection to the testimony previously sought to be adduced by respondent and which the government anticipated would be supported by cumulative testimony of this witness relating to reservoir values of lands on the shores of the Lake of the Woods. The court granted government counsel permission to state the government's objection to such

testimony and they were set before the court by the following proceedings:

By Mr. Harries:

The Government of the United States objects to the admission of any evidence concerning any of the following:

1. The availability of respondents' lands as part of the reservoir contemplated under the treaty between the United States and Canada.

2. The uses and benefits of storage of water in the Lake of the Woods.

3. Water power sites on the Winnipeg River or elsewhere.

4. Values of respondents' lands based upon their use in whole or in part as a part of such storage basin.

5. The anticipation of buyers of shore lands that reservoir uses ever had enhanced or ever would enhance the value of their lands.

In connection with the foregoing objection government counsel stated 35 grounds for such objections. These grounds of objection are set forth, herein at page ....., line ..... to page ....., line ... ([marginal] page 36, line 1,—[marginal] page 42, line 28 of typewritten transcript of Bill of Exceptions proposed by appellant), in connection with the government's objections to written offers on the part of respondents to prove certain facts by means of the testimony of Adolph F. Meyer.

Following said objections, and the grounds thereof, as stated by Mr. Harries, Mr. Lewis, on behalf of respondents, made a lengthy presentation to the Court of the rules of law on which respondents relied and of the facts which respondents were prepared to prove. Among other things Mr. Lewis stated to the court that respondents were prepared to prove that their lands had been used as a part of the Lake of the Woods storage reservoir for more than thirty years before the commencement of these condemnation proceedings, and that the lands below contour 1064, to which class respondents' lands belong, were more valuble than lands above contour 1064. That there has been no market in the usual and accepted sense of that term for flowage easements but that lands which are useful and available for storage and reservoir purposes are more valuable than lands which are not so available; and that lands which are useful and available for storage and reservoir purposes have

been bought and sold for a larger price than would have been paid for them except for that fact.

On behalf of respondents it was further stated to the court that the easement being acquired by the government is
33 not a speculative, uncertain project which will become valuable only by the acquisition and use of the easement, and the investment of capital in connection therewith, but that on the contrary respondents' lands and the easement imposed thereon, have been in actual use in the development of hydro-electric power for approximately 30 years. That large investments have been made in connection therewith; that the industry is, and for many years has been, well established and prosperous.

Upon the argument on the government's motion to strike the testimony of William Rulien respondents further stated to the court that under the Treaty of 1909 entered into between the United States and Canada, they had a cause of action against the Canadian interests which had been using their lands for storage and reservoir purposes, and that their claim was based upon the fair rental value of their lands for storage and reservoir purposes. That the condemnation proceedings instituted by the government terminated respondents' said rights against said Canadian interests, and that the damage or compensation to which respondents were entitled was the fair rental value of their lands for storage and reservoir purposes.

Respondents stated that their witnesses were present in court, prepared to testify in accordance with the oral statements made, and in accordance with the facts recited in the written offers of proof hereinafter set forth. Respondents urged that the court hear their said witnesses as a basis for the court's ruling on the question of the measure of compensation and damage, but it was the court's opinion that the question could best be presented on appeal by his excluding all evidence which in any way tended to prove that respondents' lands had any additional value solely because of the fact that they formed a part of the Lake of the Woods storage reservoir.

34 (Counsel for the respondents made the following additional statement immediately succeeding the statement last above described:

Mr. Lewis: Well, these are not to be regarded as offers of proof.

The Court: No, it is assumption of fact as the basis of your argument.)

The court sustained the government's objection to the introduction of such evidence, and an exception was duly noted by respondents.

In order to raise and squarely present the principle question of law involved in said proceeding it was moved by petitioner and ordered by the court that respondents be required to submit offers of proof, in writing, setting forth the facts which respondents claim entitle them to recover the value of their land as a part of the Lake of the Woods storage reservoir.

It is further ordered that respondents' several offers to prove certain facts by a number of different witnesses may be submitted in the form of written exhibits, and that said exhibits and written offers be considered in all respects as though each witness were on the stand, sworn to testify, as set forth in said respective exhibits.

It was also agreed between counsel and ordered by the court that an exception be saved and noted, on behalf of all parties, to each and every adverse ruling of the court.

It was agreed between counsel and ordered by the Court that in respondents typewritten offers of proof herein contained each separate paragraph or offer to prove of the several offers to prove by each of said witnesses, be regarded as a separate offer to prove, so that in the event that any given exhibit containing several offers to prove should contain inadmissible matter in any one or more offers, that fact would not operate to exclude other offers to prove contained in said exhibit which might otherwise be admissible.

Thereupon respondents submitted and offered in evidence respondents' Exhibit 34, the same being respondents' offer to prove certain facts as set forth in said exhibit by said
35 witness Adolph F. Meyer.

Said Exhibit 34, the government's objection thereto, and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"ADOLPH F. MEYER.

"Respondents offer to prove by the witness Adolph F. Meyer that there are opportunities for the development of

hydroelectric power at the outlets of the Lake of the Woods and in the Winnipeg River, which developments will derive substantial benefits from the utilization of the water storage of the Lake of the Woods reservoir, at the following sites:

Outlet of Lake of the Woods, with a head of 22 feet;

White Dog Falls and Boundary Falls, with a head of 45 feet;

Point Dubois, with a head of 46 feet;

Slave Falls, with a head of 26 feet;

Seven Sisters, with a head of 66 feet;

McArthur Falls, with a head of 18 feet;

Great Falls, with a head of 56 feet;

Pine Falls, with a head of 37 feet.

That the total concentrated head of all of the site is 316 feet.

Mr. Harries: Subject to the right to make additional objections, with respect to the matters contained in the three additional pages, which counsel has just handed to the government counsel, the United States objects to the reception of the testimony of Adolph F. Meyer upon the grounds stated in those two sheets attached to the copy of Mr. Meyer's testimony, which are now presented to the reporter.

(Document marked General Government's Exhibit 98 for identification by the reporter.)

The Government objects to each item of the foregoing proposed offer of proof by respondents upon each of the following grounds as to each item of such offer or proof:

36 The objection on the part of the United States to the admission of such evidence is made upon the following grounds:

1. That such evidence is incompetent, irrelevant and immaterial.

2. That such testimony is highly speculative and conjectural for the following reasons:

(a) It erroneously assumes as an existing fact fixed costs of plant site, operation, personal, taxes and finances without basis other than conjecture and speculation.

(b) It assumes as a fact the full development of the power which such a reservoir is capable of producing and

also erroneously assumes a market for the said power so assumed to be developed as a result of the assumed use of said basin and respondents land as a part thereof.

(c) It assumes the earning of large profits from the use of the power so assumed to be developed and used.

(d) It assumes the practicability of uniting in one ownership approximately 1573 separate parcels of land without the exercise of eminent domain.

(e) It erroneously assumes the full development of all the power of which said reservoir is capable and also the constant employment of the same on a basis of fixed profit.

(f) It excludes the use of said power which said body is capable of producing under full development for municipal or other public purposes on a cost basis or small margin of profit.

37 3. That no sufficient foundation has been laid for the introduction of said testimony.

4. That such testimony does not go to the true measure of damages in this case; namely, the difference in market value of the property affected by the easement before and after such easement is imposed.

5. That such testimony presupposes and assumes a state of the titles to the said lands at variance with the status thereof at the time of the condemnation; that is to say, at the date of the filing of the awards of the Commissioners.

6. That respondents have not sustained the burden of first proving the practicability of unifying shore ownerships, as required by law.

The Government further objects to any such evidence upon the further grounds:

1. The multiplicity of titles to lands affected by petitions of the Government for condemnation pursuant to the treaty between the United States and Canada makes it utterly impracticable as a matter of law to unite them for reservoir purposes, except through the intervention of the power of eminent domain.

(a) The physical magnitude of the project embracing 78,081 acres of land distributed along a shore line of over 1500 miles of mainland shoreline, the ownership of which is reposed in approximately 850 recorded fee owners of lands in the United States of whom many have died, leaving unknown

heirs, or have disappeared to parts unknown, and approximately 723 private owners in the Province of Ontario, render the exercise of the power of eminent domain the sole
38 practical means of so regulating or lawfully affecting the levels of the lake.

2. Similarly, the multiplicity of titles to the land affected in this proceeding, pursuant to the said treaty between the United States and Canada makes it utterly impracticable as a matter of fact to unite them for reservoir purposes save by eminent domain.

3. The ownership by the United States of a vast acreage ranging from approximately 50,000 acres when the lands in question were first opened for entry to 11,000 acres of land at the time the present proceedings were instituted rendered it impossible for any private interest to acquire and exercise a lawful right to flood the margins of the lake or otherwise control its levels.

(a) The homestead law, (43 U. S. C. A. Sec. 162) Provides that lands in the public domain must be taken for the purpose of actual settlement and not for speculation.

(b) The Act of Congress of January 14, 1889, entitled, "An act for the relief and civilization of Chippewa Indians in the State of Minnesota," (25 statutes at large 644) provides that the agricultural lands acquired under the act "shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law."

4. That the ownership of a large part of the lands necessary for such reservoir and owned by the Province of Ontario, the policy of which province is opposed to the acquisition of any exclusive right of control of power sites and said lake levels, render it extremely unlikely, if not wholly
39 impossible, to acquire flowage rights on the Canadian shore.

5. That the shore lands bordering on the Lake of the Woods have been continuously subject to four separate governmental jurisdictions until July 15, 1930, and since that date subject to five governmental jurisdictions, each charged with the duty of protecting its own interests therein and to preserve and perform its own administrative policies, making it wholly impracticable for private interests to acquire flowage rights thereon.

6. That the Lake of the Woods is international and navigable boundary water, the right to regulate and control which

reposes solely in the United States and the Dominion of Canada.

7. That under the laws of the Dominion of Canada the Lake of the Woods, at least to the extent thereof within the boundary of the Dominion of Canada, is wholly subject to the jurisdiction of the Dominion Government for the protection of navigation thereof.

8. That structures on the Lake of the Woods outlets controlling the regulation of the lake have been under governmental control from 1898 to the present time for the protection of navigation and this physical control of such outlets by a governmental agency in the interest of one of its prime functions, precludes the possibility of control of the lake levels by any other agency or interest.

9. The Lake of the Woods has been subject to international commitment, regulation and control since the treaty of 1909 with Great Britain, which established the order of precedence of the various interests, with power in fourth place.

10. All Crown lands in the Provinces of Manitoba and Ontario were withdrawn in 1915 and 1920 from any disposition inconsistent with governmental control and regulations.

11. The Indian Act of the Dominion of Canada, requiring a majority consent from each band located on Indian reservations adjacent to said lake, of which there are forty in number, renders it wholly impracticable and unfeasible to contemplate successful negotiations with said Indian occupants leading to their consent to relinquishment of their reservations.

12. The interests on the part of those concerned in the level of the Lake of the Woods are varied and embrace navigation, fishing, lumbering, domestic and sanitary purposes and power and these interests require radically different stages and conditions of the levels of said lake, and because they are so radically different one from another they preclude the reasonable expectation that the same could be reconciled by any persons or concern other than governmental authority.

13. Respondents' testimony on the reservoir value is inadmissible until proof is made of a reasonable possibility of uniting in one person or firm.

(a) Power to unify shore ownership.

(b) Right to control the levels of the lake.

(c) Physical control of the outlets of the lake, each of which it is absolutely impracticable to so much as contemplate except by the joint action of the National Sovereignties having jurisdiction of the Lake of the Woods.

14. That it is impracticable as a matter of law for any power interest to unify ownership on the margin of said lake because of the law of the State of Minnesota (Sections 8076 and 8077, Mason's Minn. Stat. 1927), forbidding foreign interests to acquire more than 90,000 square feet of land in Minnesota.

On the ground that it conclusively appears that the regulation of the levels of said lake can be maintained or controlled only by governmental agency and by the exercise of the power of eminent domain. In connection with this ground objection in addition to other matters before the Court, there is called to the attention of the Court:

1. Section 10437, Mason's Minn. Stat. 1927, providing that to drain or attempt to drain in any manner any lake or body of water meandered by the United States is a gross misdemeanor, and also,

2. Article 2, Section 2 of the Constitution of Minnesota and the Enabling Act of 1857, page XII, Mason's Minn. Stat. 1927, to the effect that water forming boundaries with other states shall be common highways and forever free.

Further in this same connection, attention is called to the Acts of Congress approved June 7 and July 1, respectively, 1898, (30 Stat. 67, 571, 576) expressly reserving to the United States the right to flow the lands involved herein without any liability therefor to any person so acquiring said land thereafter.

Objection is further made to the introduction of such evidence for the reason that even if it be assumed that the said Acts June 7 and July 1, 1898, respectively, are impliedly repealed by the Treaty of 1925; we have this situation:

1. Immediately upon the going into effect of the Treaty of 1925 all possibility of unifying shore ownership, except by the United States in the exercise of eminent domain, was foreclosed.

42 2. But subsequent to 1898 and up to the signing of the treaty of 1925, the Acts of 1898 were certainly in full force and effect and expressly gave the United States the sole right to overflow the shore lands in aid of navigation. In the face of this existing right no other agency could have acquired a flowage right for any purpose from 1898 to the date of the Treaty; after which it was still true that no agency except the United States could acquire a flowage right.

The offer of testimony by the respondents is objected to further on the ground that the union of properties necessary for the project is so impracticable that the possibility of such union could not affect the market value or price.

The Government objects to all testimony relative to the acquisition of shore lands because of their supposed value for storage purposes. The ground of this objection is that it matters not whether one or ten or twelve of these good people, or one hundred, or all of them were deceived into the belief that they could acquire lands on the shore of the Lake of the Woods and thereby hope for some enhancement in their value on account of reservoir purposes—it matters not at all if all of them were deceived in that belief if as a matter of law that could not have taken place, and unification could not have been completed, and there was no buyer in the market who could ever have undertaken to acquire those lands.

Mr. Harries: 1. The Government objects to the admission of this testimony (1) upon the ground that no foundation has been laid for proof of the foregoing facts by this or other witnesses; (2) upon the ground that the witness has
43 not been qualified to testify to the foregoing facts; (3) upon all the grounds stated at the opening of court January 27, 1931, beginning at page 233 of the record, which said objections are identical with the objections as hereinbefore quoted beginning with line 1 on [marginal] page 36 and ending with line 3 on [marginal] page 43 of this typewritten transcript.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 2. Respondents further offer to prove by said witness that it is practicable to develop a total of about 325,000 electrical horse power on a 24 hour basis at the said site with the regulated outflow from Lake of the Woods.

Mr. Harries: 2. The Government objects upon all the grounds stated at the opening of court January 27, 1931, beginning at page 233 of the record; and upon the ground that it is immaterial what power could be developed with regulated outflow from the Lake of the Woods unless competent proof is first made of the practicability of using such power, by first establishing (a) the market; (b) the cost of marketing; (c) the cost of developing a market; (d) the cost of producing and (e) that there exists no source of cheaper power.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 3. Respondents further offer to prove by said witness that he knows the conditions in the regions in which it is practicable to distribute the electrical power generated at said power sites with respect to the existing demand and market, and the possible future demand and market for such power. That during 1929 and 1930 there was a demand and market for the entire output of all power plants
44 then in operation, and because of difficulty in supplying such demand the power interests were asking that power users economize in the amount of power consumed. That recently another power unit has been completed so that there is at present some surplus of power. That in his opinion, however, such surplus will all be taken up within a period of from three to five years, and that there will be a demand and market for all the power which can be developed at said sites within a comparatively short time.

Mr. Harries: 3. To this the Government objects that the same is purely speculative and conjectural, without adequate foundation; and wanting in proof of what power can now be developed from said sites.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 4-a. Respondents further offer to prove by said witness that during the course of his investigations as consulting engineer for the International Joint Commission he calculated what would have been the average dependable outflow of water from the Lake of the Woods at its outlets under natural conditions. That said average dependable outflow under natural conditions would have been from 6500 to 7000 cubic feet per second.

4-b. Respondents further offer to prove by said witness that he has determined what the average dependable outflow is and will be from the Lake of the Woods with the lake utilized as a storage reservoir and the waters controlled as contemplated by the treaty. Said average dependable outflow is and will be a little more than 10,000 cubic feet per second, making an increase of 3,000 or 3,500 cubic feet per second over the average dependable outflow under natural conditions.

45 4-c. Respondents further offer to prove by said witness that the continuous power that could be developed at the outlets of the lake, with the lake utilized as a storage reservoir and the waters controlled as contemplated by the treaty, would be increased, as compared with natural conditions, in the same relative proportion as the average dependable outflow, that is, about 50%.

Mr. Harries: 4-a-b-c. The Government objects to the admission of the testimony comprised in the three paragraphs last above written upon the ground that no proper foundation has been laid; there is no proof that the average dependable outflow under treaty control can be utilized at existing or future power sites; and upon the grounds stated beginning at page 233 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 5. Respondents further offer to prove by said witness that from his connection and experience with hydroelectric projects in general, and especially those at the outlets of the Lake of the Woods and in the Winnipeg River, and from his acquaintance with the value of the Lake of the Woods storage reservoir and the hydroelectric projects at the outlets of the Lake of the Woods and in the Winnipeg River, and from his acquaintance with the demands for power in the territory available to the interests or authorities operating or controlling said projects, he has formed an opinion as to whether such interests or authorities would seek to acquire the flowage rights and easements contemplated by the treaty of 1925 if said treaty had not been entered into and if said easements were not being acquired by the United States. That in his opinion said interests or authorities would seek to acquire such flowage rights and easements.

46 Mr. Harries: 5. The Government objects to the admission of the foregoing proffered testimony on the grounds (1) that it is speculative, conjectural and without any foundation; (2) that it is immaterial what any given interest would "seek" unless final validity in relation to power interests is established for the doctrine "seek and Ye shall find"; and upon the grounds stated by the Government beginning at 233 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 6. Respondents further offer to prove by said witness that the reasons for his opinion stated in the last preceding offer of proof are as follows: That it is impossible to utilize the storage possibilities of the Lake of the Woods reservoir without flooding the shore lands in the State of Minnesota. That the value of the Lake of the Woods as a storage reservoir in the development of continuous power is so great that considerations of economy and good business, as well as the desire on the part of interests or authorities owning or controlling the power projects to be secure in the use and enjoyment of said reservoir, would require the acquisition by them of the flowage and storage rights and easements on the shore lands in Minnesota.

Mr. Harries: 6. The Government objects to the admission of the foregoing testimony on the ground that it is too indefinite to be a proper subject of legal proof; is speculative and conjectural, without proper foundation; and further objects on all grounds stated by the Government beginning at page 233 of the record; and the testimony that it is impossible to utilize the storage possibilities of the Lake of the Woods reservoir without flooding the shore lands in Minnesota
47 is objected to as a false statement of what the witness would testify, and said witness Adolph F. Meyer established the falsity of said offer in an affidavit made part of this record in connection with this offer of proof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 7. Respondents further offer to prove by said witness that from his experience and contacts with the acquisition and development of reservoir and power projects, he knows that there is an established custom and practice which is usually followed arriving at the fair market value of flow-

age and storage rights and easements where the same are sought to be acquired through negotiation and purchase, and that he knows what such custom and practice is.

Mr. Harries: 7. Proof of the custom and practice usually followed is objected to as immaterial to the issues of this case where the same were not followed and as a matter of law could not be carried out.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 8. Respondents further offer to prove by said witness that such custom and practice is as follows: That negotiations are carried on between the owner of the flowage rights and easements and the party desiring to acquire the same. That the owner is usually willing to sell but is not required to do so. The party desiring to acquire the easement is usually willing to buy but is not compelled to do so. Each party will exercise the best judgment that he possesses, based upon information he has, with the result that the parties will usually agree on a price which will be somewhere between the use value of the flowage right and easement to the pur-
48 chaser and the use value of the land to the landowner, which price will not be based on the needs of the purchaser or the profits which he will derive from the project nor on the value of the land to the owner but will represent a fair market value reached through negotiation and bargaining in the manner stated.

Mr. Harries: 8. The Government objects to the admission of the proposed testimony upon the grounds of objection last above stated; upon the ground that in this proceeding neither the use value of flowage rights nor use value of owners' lands is the true measure of damage; on the ground that the proposed testimony states a legal conclusion as to what constitutes fair market value.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 9. Respondents further offer to prove by said witness that from his knowledge and experience he has an opinion as to whether the fair market value of the flowage easements contemplated by the treaty of 1925 would have been arrived at and the title to said easements acquired by the interests or authorities operating or controlling the power projects through negotiation and purchase, if the treaty had not

been entered into and if the United States had not undertaken thereby to acquire such easements. That in his opinion the fair market value of said easements would have been arrived at and said easements acquired in the manner described in the last preceding offer of proof.

Mr. Harries: 9. The Government objects to the reception of the proposed proof upon the ground that it is not based upon the true measure of fair market value; that it assumes facts that are purely conjectural; and upon the ground that on the date of the Commissioners' awards in this proceeding and for four years prior thereto the treaty of 1925 pre-
49 cluded acquisition of easements by anyone other than the present condemnor.

The Court: The objection is sustained.

Mr. Lewis: 10. Respondents further offer to prove by said witness that in his opinion the title to said easements could and would have been acquired by the interest or authorities operating and controlling the power projects in accordance with the custom and practice described in the foregoing offers of proof. That the acquisitions of said easements by said interests or authorities could and would have been accomplished through the medium of subsidiary American corporation or other American agency acting on behalf of or co-operating with the Canadian interests or authorities.

Mr. Harries: 10. The Government objects to the admission of the proposed offer upon the ground that it is speculative and conjectural; upon the ground that it contains conclusions of law; and upon all grounds stated by the Government beginning at page 234 of the record, which said objections are set forth verbatim on [marginal] page 10, line 1 to [marginal] page 43 line 3 in this typewritten transcript.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: Respondents further offer to prove by said witness Adolph F. Meyer, that for a number of years before 1925, he was consulting engineer for the Keewatin Power Company and that he has been consulting engineer for said company from 1925 to the present time; that he is acquainted with the facts and circumstances leading up to and continuing through the negotiation and execution of the contract entered into between said Keewatin Power Company and the Govern-

ment of the Dominion of Canada, and that he knows the
50 desires and requirements of the interests and authorities operating and controlling the dams and projects at the outlets of said lake regarding the use and control of said Lake of the Woods reservoir, as such desires and requirements conflicted with the desires and requirements of the interests and authorities operating and controlling the projects in the Winnipeg River.

Mr. Lewis: Respondents further offer to prove by said witness Adolph F. Meyer, that the interests and authorities operating and controlling the same and projects at the outlets of said lake, within the province of Ontario, at all times favored and required and now favor and require a different outflow and type of storage and control of the waters of said lake from those favored and required by the interests and authorities operating and controlling the projects in the Winnipeg River, within the Province of Manitoba.

Mr. Lewis: Respondents further offer to prove by said witness that the difference between the outflow, and the type of storage and control favored and required by said Ontario interests and authorities, and those favored and required by said Manitoba interests and authorities, was substantial and fundamental, and was such as caused and would cause said Ontario interests and authorities to compete with said Manitoba interests and authorities for the right and power to develop and control said Lake of the Woods storage reservoir.

Mr. Harries: The Government objects to the foregoing testimony upon the following grounds. (1) It is too general and indefinite to be received in evidence; (2) The probabilities of competition are not a proper subject of expert testimony by this witness; (3) The testimony is speculative; (4) no foundation has been laid for its introduction; (5) it
51 is further objected to as immaterial; (6) The Government objects to testimony of a difference in interest between Ontario and Manitoba authorities as to outflow control, upon the ground that these differences would not put such authorities in competition for flowage rights; and objects to testimony of competition for the right to develop and control the Lake of the Woods reservoir on these grounds: (a) competition for the right to develop the reservoir would not put said authorities in competition for the lands on the American shore, but would go only to the Canadian governmental privilege of controlling the outlets; (b) there is no showing that such competition was reflected in market values on the south

shore; (c) as a matter of law, such competition could not be reflected in market values on the south shore because of the impracticability of developing and controlling the reservoir without the intervention of eminent domain.

Mr. Lewis: Respondents further offer to prove by the witness Adolph F. Meyer that prior to the signing of the treaty of 1925 and the negotiations leading up to said treaty the power capacities at the outlets of the Lake of the Woods and in the Winnipeg River deriving substantial benefits from the Lake of the Woods storage reservoir had already been developed to such an extent that the interests or authorities operating or controlling said power developments would, for the reasons stated in preceding offers of proof, have sought to acquire the flowage easements required for the Lake of the Woods reservoir if the treaty had not been entered into.

Mr. Harries: The Government objects to this testimony as a conclusion, without proper foundation, incompetent, irrelevant and immaterial.

The Government also objects to all of the proposed
52 testimony of Adolph F. Meyer, and to each item thereof upon each of the grounds stated on pages 613 to 620A inclusive of the record immediately after the offer to prove previously made by means of the witness Adolph F. Meyer," as shown on [marginal] page 36, line 1, to [marginal] page 43 line 3, of this typewritten transcript.

Respondents next offered in evidence respondents' Exhibit 35, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness Clarence H. Nelson, electrical hydraulic engineer for the Minnesota State Tax Commission. Said Exhibit 35, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"CLARENCE H. NELSON.

11. Respondents offer to prove by the witness Clarence H. Nelson that he is a resident of the City of Minneapolis. That he was graduated from the University of Minnesota in 1925 with degree of electrical engineer. That since his graduation he has been employed for a year and a half with the Public Service Company of Northern Illinois, with offices at Chicago, and that since February, 1927, he has been electrical

and hydraulic engineer for the Minnesota State Tax Commission.

12. Respondents further offer to prove by said witness that he is acquainted with the custom and practice in the State of Minnesota in the taxation of flowage rights and easements.

13. Respondents further offer to prove by said witness that for a number of years last past the State of Minnesota and the various taxing authorities of said state and of the political subdivisions thereof in which water power of storage projects are located have taxed flowage rights and
53 easements as separate and distinct property.

Mr. Harries: The Government objects to the offer on the grounds stated in the statement of objections attached to the copy of the proposed testimony of Mr. Nelson, and I ask to have it marked as government's Exhibit 99.

13. The Government objects upon all of the grounds stated at the opening of court January 26, 1931 (record page 233); and upon the further grounds (1) that the mode of assessing taxes or determining elements of value for purposes of taxation is incompetent, irrelevant and immaterial; (2) that the proposed testimony contains conclusions of law for proof of which by this witness no proper foundation has been laid.

The Government also objects to all of the proposed testimony of Clarence H. Nelson and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer, as shown on [marginal] page 36, line 1, to [marginal] page 43, line 3 of this typewritten transcript.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Respondents next offered in evidence Respondents' Exhibit 42, the same being respondents' offer to prove certain facts as set forth in said exhibit by W. E. KING, a consulting engineer. Said Exhibit 42, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

Mr. Lewis: Respondents next offer to prove by the witness W. E. King the facts set forth in Respondents' Exhibit

42, and state to the Court that if the witness W. E. King were permitted to testify that he would testify to the
54 facts set forth in said exhibit.

Mr. Harries: The Government objects to the offered testimony upon the grounds set forth in the statement of objections attached to a copy of the offer to prove by respondents, and I ask to have the document marked as General Government's Exhibit 100.

(Document marked General Government's Exhibit 100 for identification by the reporter.)

Mr. Lewis: 14. "Respondents offer to prove by the witness W. E. King, duly sworn and on the stand ready to testify, that he is a graduate of the University of Minnesota, 1905, with the degree of Civil Engineering; that he is a member of the American Society of Civil Engineers, the American Concrete Institute, the St. Paul Society of Engineers, and is a registered engineer licensed to practice said profession in the State of Minnesota. That said witness has been actively engaged in the engineering profession since the year 1905; that for two years he was employed by the American Bridge Company of Minneapolis, Minnesota, as an Engineer; for one year he served as engineer for the Minneapolis Steel and Machinery Company, and for one year as engineer in the bridge Department of the Great Northern Railway Company; that during all other times since the year 1905 he has been and now is a practicing and consulting engineer. That said witness has had a wide and varied experience in power projects involving the purchasing and valuing of flowage easements; that among such projects to which he has given study and with which he has been actively engaged are the following: The construction of two dams in the Des Moines River near Humboldt, Iowa, where his duties consisted in the erection of such dams and in the valuing of the flowage easements purchased for reservoir purposes on such projects;
55 that he supervised the construction of the dam at Rutland, Iowa, where his duties were similar to those described in the said projects at Humboldt, Iowa; that he was called in as consulting engineer to assist in determining the value of flowage and storage easements acquired by the Northern States Power Company on its project in the Mississippi River near St. Paul. That he has been consulted on numerous occasions with respect to valuing flowage and storage easements for the purpose of rate-making; that he was recently engaged in behalf of Morrison County, Minnesota, in the valuing of flowage and storage easements on the so-

called Blanchard Dam Project and Little Falls Dam project, which valuations were made to determine the value of said flowage and storage easement for the purpose of taxation.

Mr. Harries: 14. The Government objects to any statement of qualifications to determine the valuation of flowage rights for the purposes of taxation as being immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 15. Respondents further offer to prove by said witness that he knows that there is a custom and practice in the State of Minnesota and in other northwestern states with reference to the purchase and conveyance of flowage easements. That it is the custom and practice in the State of Minnesota and other northwestern states to purchase, sell, and transfer flowage easements as separate and distinct units of property, and that for many years flowage easements have been regarded and dealt with in the State of Minnesota as such separate units of private property. That flowage easements are commonly recorded in the offices of the Register of Deeds of the several counties of Minnesota in like manner as other deeds of conveyance.

56 Mr. Harries: 15. The Government objects to this testimony of the witness as a conclusion of law, and without proper foundation; upon the ground that the custom and practice stated is not a proper measure of damage in this proceeding; on the ground that custom and practice is immaterial; and on the ground that the custom and practice proved must be the custom and practice at the time when and the place where the condemnation is exercised.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 16. Respondents further offer to prove by said witness that he has been personally connected with the evaluation and assessment of flowage easements in the State of Minnesota, and that he has made a study of the practice of the taxing authorities in said state in assessing and taxing flowage easements. That he knows of his own knowledge that flowage easements are assessed and taxed as separate and distinct units of private property by the taxing authorities of various places in said state.

Mr. Harries: 16. To which the government objects on the ground that the practice of taxing authorities is irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 17. Respondents further offer to prove by said witness that there is a well established and generally recognized custom and practice among hydraulic engineers and owners and operators of projects involving flowage easements and reservoir, and among those charged with the responsibility of appraising the value of flowage easements. That he knows what this custom and practice is. That this custom and practice is that the value of each storage reservoir and of the flowage easements required therefor
57 is appraised and determined on the special facts and circumstances in connection therewith.

Mr. Harries: 17. To which the Government objects on the ground of objection to number 15.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 18. Respondents further offer to prove by said witness that there is no market for flowage easements in the State of Minnesota and other northwestern states as the term "market" is commonly understood. That there is no market value in said region for flowage easements as the term "Market value" is commonly understood. That from the nature of the projects for which flowage easements are required it is impossible for a market therefor to exist, because the value of each such project and of the flowage easements required therefor must be determined according to the special facts and conditions thereof.

Mr. Harries: 18. To which the Government objects on the ground that special facts and conditions are not the true measure of damage; and on the ground that the testimony of what constitutes a market or market value is a conclusion of law; as incompetent, irrelevant and immaterial, and without proper foundation, and upon each ground heretofore stated.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 19. Respondents further offer to prove by said witness that the method uniformly used in appraising and determining the value of any easement for flowage or storage purposes according to the well established custom and

practice which has been described by the witness and with which the witness is acquainted is to take into consideration the storage capacity of the reservoir in question, the location
58 of the reservoir with reference to the place of utilization of the water stored therein, the extent to which and the manner in which the water can be utilized, the time which will be required therefor, and the economic practicability of the development and operation of the necessary project works. The determination of the value of the reservoir as a whole and of each component part thereof, including the value of the several flowage easements required, then becomes a matter of expert intelligence and professional judgment, based upon experience.

Mr. Harries: 19. To which the Government objects upon each ground heretofore stated and upon the further ground that the witness leaves out of account the vital consideration of the practicability of uniting ownership of the properties necessary for the project and deals only with the economic practicability of the development. The government also objects to all of the proposed testimony of W. E. King and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Respondents next offered in evidence Respondents' Exhibit 43, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness GARDNER S. WILLIAMS, a consulting engineer. Said Exhibit 43, the government's objections thereto, and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

Mr. Lewis: 20. Respondents offer to prove by the witness Gardner S. Williams as follows:

That he resides in Ann Arbor, Michigan, and is 64
59 years of age. That his present occupation is consulting engineer. That he has had 43 years engineering experience. That he is a member of the following engineering societies:

Member American Society of Civil Engineers.

Member American Society of Mechanical Engineers.

Member The Detroit Engineering Society, and others, and has been a Vice President of American Engineering Council for the past 7 years.

That he was educated in the public schools of Saginaw, Michigan, and at the University of Michigan, where he was graduated with degree of Bachelor of Science in Civil Engineering in 1889, and received advance degree of Civil Engineering in 1899. That he began work on local land surveys while in college and in the summer of 1887 was engaged on water works construction at Bismarck, North Dakota, and similarly in 1888 and 1889 at Greenville and Owosso, Michigan, respectively. That from 1889 to 1893 he worked for the Russel Wheel & Foundry Company of Detroit, a firm of manufacturing contractors in iron and steel, as draftsman and engineer, and from 1893 to 1898 was civil engineer to the Board of Water Commissioners of Detroit. That from 1898 to 1904, he was Professor of Experimental Hydraulics and Engineer in Charge of the Hydraulic Laboratory at Cornell University; and from 1904 to 1911 was Professor of Civil, Hydraulic and Sanitary Engineering at the University of Michigan, also carrying on a consulting practice from 1898. That he was appointed a member of the International Waterways Commission by President Roosevelt in 1903 and resigned therefrom in 1905. That since leaving the University of Michigan in 1911 he has been engaged in consulting work, mainly along water power and water supply and other hydraulic lines; and has been called to practice in 21 states as well as the Canadian Provinces of Quebec and Ontario, the major part of his work having been in Michigan, Illinois and Minnesota, in each of which he is registered to practice engineering. That among his important works in Michigan have been the design and construction of hydroelectric power plants for the Edison Sault Electric Company in the rapids at Sault Ste. Marie, Michigan, with which he was connected from 1905 to 1916; the design and construction of a series of five hydroelectric power plants with local storage on the Huron River in Michigan for the Detroit Edison Company, between 1906 and 1926. Also the design and construction of hydroelectric plants for the City of Sturgis, Michigan, on the St. Joseph River and for the Alpena Power Company on the Thunder Bay River in Michigan. That in Iowa he designed and supervised the construction of a dam across the Des Moines River at Des Moines, Iowa, for power and storage purposes. That in Illinois, his engagements have been mainly in connection with the constructions, hydraulic investigations and litigations of the Sanitary Dis-

trict of Chicago, including studies in the regulation of the international waters of the Great Lakes System. That in Minnesota in 1911-12 he was employed by the Corps of Engineers of the United States Army to design the substructure of the Power House at Lock & Dam No. 1 of the Mississippi River Improvement, which is located between Minneapolis and St. Paul, and which was constructed after the plans prepared by him, and in 1913 he was engaged as consulting engineer to design and supervise the construction of various storage dams for the Great Northern Power Company of Duluth, and continued in that relation until the property of the company was sold in 1923, during which time there were constructed the Island Lake Storage Dam, the Boulder Lake Storage Dam, and the Whiteface Reservoir Dam, and extensive studies were made of possible equalization of the flow of the St. Louis River. That from 1916 to 1918 he was
61 engaged in the reconstruction of the hydraulic power plants of the Watab Pulp & Paper Company, at Sartell, Minnesota, and in the water power and storage investigations in connection with that property. That he has been a witness in various litigations among which are:

The Drainage Canal case, State of Missouri vs. State of Illinois, etc., in the U. S. Supreme Court.

The Sanitary District Cases; U. S. vs. Sanitary District of Chicago, in the U. S. District Court for Northern Illinois.

The Chandler-Dunbar Water Power case in the U. S. District Court for Western Michigan; Milwaukee vs. Western Foundation Co., in the U. S. District Court for Eastern Wisconsin; Wm. Cramp & Sons vs. Wellman-Seaver Morgan Co., in the U. S. District Court for Northern Ohio; Neely vs. Ford Motor Co., in the U. S. District Court for Eastern Wisconsin; Wisconsin et al. vs. Illinois & Sanitary District, before the U. S. Supreme Court, with Justice Charles Evans Hughes as Master.

That he has also been a witness in the state courts of Michigan, Illinois, Minnesota, Iowa, New York, Wisconsin, and Virginia. That in cases involving valuations he was the principal witness for the company in City of Ithaca vs. Ithaca Water Works Company for condemnation in New York. That he was a leading witness for the defendants in U. S. vs. Chandler Dunbar Water Power Company, et al. That he was also a witness in Loranger vs. City of Flint, a water diversion and drainage case in Michigan, and in the City of Chicago vs. Sanitary District of Chicago, a sewer

right of way condemnation case in Illinois. Also in Marselles Water Power Co. vs. Northern Illinois Traction Co., a water power valuation case in Illinois, and in Land-
62 owners vs. Watab Pulp & Paper Co., a flood damage case in Minnesota. Also in City of Pontiac vs. Commercial Milling Co., a water power condemnation case in Michigan; in Bryant Paper Co. vs. Monarch Paper Co., a flood damage case in Michigan; In Rayburn Lumber Co. vs. Alpena Power Company, a flood damage case in Michigan; and in Hubbell vs. Van Tine, et al., a water storage and damage case in Michigan. That he was also a leading witness for the defendant in Warner Moore & Co. vs. Chesapeake and Ohio Ry. Co., a water supply damage case in Virginia, and has made several appraisals of property for sale or bonding purposes. That among the latter, for several years he made appraisals of the additions and betterments of the properties of the Great Northern Power Co. of Duluth, for bonding purposes, in which the betterments, etc. consisted of water power and storage lands and constructions, transmission lines and appurtenances, rights of way, power plants, etc. During the World War he was an Associate Member of the Naval Consulting Board and engaged on the survey for Industrial Preparedness of Michigan, in 1916, and was a Major in the Engineer Officers Reserve Corps, stationed at Camp Beauregard, La., on camp construction, and at Washington, in the constructing quartermaster's department, in 1917. That in the acquisition of lands for water power or reservoir purposes, in association with three other gentlemen, he acquired control of some 12,000 or 14,000 acres of water power lands in Michigan on the Tittabawassee and Tobacco Rivers comprising sites for five dams and power plants, making a reservoir development of the stream covering some 90 miles of river and tributaries designed to equalize about 75 per cent of the flow of the stream, which involved the acquisition of about 400 parcels without the exercise of powers of eminent domain or any government assistance, there be-
63 ing no water power condemnation in Michigan at that time, which was between 1907 and 1917. That the property so acquired has been since developed. That between 1906 and 1920 he had charge of the expenditure of nearly a million dollars for water power lands and rights on the Huron River in the State of Michigan for the Detroit Edison Company, the prices paid for the latter lands and rights ranging from $16.00 to $400.00 per acre. Those properties were to a large extent secured for reservoir purposes as each plant was developed with as much storage above it

as it was possible to get, and they consisted in part of flowage easement and in part of fee acquisitions.

Mr. Lewis: 21. Respondents further offer to prove by the witness Gardner S. Williams that he has studied and acquainted himself with the report known as Water Resources Statement No. 3 of the Dominion Water Power Branch, Department of the Interior of Canada, published in 1915, entitled "Winnipeg River Power and Storage Investigation," by J. T. Johnson, also with the documents known as Water Power Resources Paper of the Department of the Interior of Canada, Dominion Water Power and Reclamation Surveys, Nos. 31, 54 and 57, as well as with a very large amount of other literature and engineering and statistical data and information relating to the power resources and development of the Lake of the Woods and Winnipeg River. That he has personally visited and examined the Lake of the Woods and the Winnipeg River Power Projects, and that he knows the power capacities of the Lake of the Woods and the Winnipeg River and the extent of the development of such capacities up to the present time. That he has visited the City of Winnipeg and the villages of Kenora and Rainy River and intervening points in Canada, and the villages of Warroad, Baudette and intervening points in the
64 State of Minnesota. That he is familiar with the character of the lands involved in these condemnation proceedings.

Mr. Harries: 21. The Government objects to so much of the statement of qualifications as is based upon Water Power Resources Papers on the ground that the same are hearsay, and no opportunity is afforded to cross-examine their author J. T. Johnston or other authors thereof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 22. Respondents further offer to prove by said witness that he has heard or has read the official reporter's transcript of all the testimony given by Adolph F. Meyer in this proceeding relating to the facts and conditions of the Lake of the Woods, of the watershed of said lake, of the storage reservoir of said lake, of the Winnipeg River, of the Power developments and other works in said lake and river, of the control that has been exercised and the use that has been made of the waters of said lake and

river, and particularly of the storage reservoir of said lake by means of said power developments and other works, also the testimony of said Adolph F. Meyer as to the facts and conditions of the resources and capacities of all of said waters for power and other purposes.

23. Respondents further offer to prove by said witness Gardner S. Williams that he has made a study of the advantage to be derived by the power projects at the outlets of the Lake of the Woods and in the Winnipeg River by the utilization of the storage possibilities of the Lake of the Woods in conformity with the provisions of the treaty of 1925.

24. Respondents further offer to prove by said witness that the utilization of the storage capacity of the Lake of the Woods pursuant to said treaty will result in an in-
65 crease of the continuous water horse power which can be developed by said water power projects of approximately 200,000 such horse power.

Mr. Harries: 22-23-24. The Government objects to the foregoing testimony upon each of the grounds stated immediately following the last of the offers of proof of respondents; and further objects to such testimony on the ground that the same is without proper foundation; and on the ground that the evidence is immaterial because there is no evidence that existing power plants can utilize the continuous flow from increased storage and so develop 200,000 additional horse power; nor that there is a market for the same.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 25. Respondents further offer to prove by said witness that the significance and advantage of obtaining a constant stream flow and continuous horse power which would be obtained through the utilization of the storage capacity of said lake is that since there is no other available source of power in the area furnishing a market for the output of the aforesaid development sufficient to supply the required power at times when the output of said developments under natural conditions would be low, it is important to obtain a constant stream flow by utilizing the Lake of the Woods storage, thus making it possible to deliver a substantially uniform quantity of power from day to day and month to month, limiting the variation in the quantity of available power to a minimum.

Mr. Harries: 25. The Government objects to the foregoing testimony on the ground that the Court will take judicial

notice of its falsity by reason of the available sources of power on the English and Nelson Rivers sufficient to
66 supply the same market without any resort to Lake of the Woods storage; and an additional source in the Saskatchewan River, within 150 miles of Winnipeg capable of developing 325,000 horse power.

The Court: Objection sustained.

Mr. Lewis: Exception.

Mr. Lewis: 26. Respondents further offer to prove by said witness that he has informed himself concerning the demand and market for power in the territory supplied ffom the aforesaid projects, and that he has found that the power requirements of said area are now or will be in the very near future sufficient to consume the entire output of said power projects with the full utilization of the storage capacity of the Lake of the Woods as contemplated by the treaty of 1925.

Mr. Harries: 26. The Government objects to the foregoing testimony on the ground that it is speculative and conjectural and without any foundation in the way of proof of what the market demand is or will be.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 27. Respondents further offer to prove by said witness that he has studied the physical and international conditions and aspects of the Lake of the Woods storage reservoir with respect to the practicability of acquiring the flowage easements necessary to the development and utilization of said reservoir, and that he has formed an opinion with reference thereto, based upon his said study and upon his knowledge and experience gained as stated in the foregoing testimony and offers of proof. That it is his opinion and firm belief that it would be entirely practicable for the interests or authorities operating or control-
67 ling the power projects to acquire and unify the flowage easements necessary to the development and utilization of the Lake of the Woods storage reservoir as contemplated by the treaty of 1925.

Mr. Harries: 27. The Government objects to the foregoing testimony on the ground that it constitutes a conclusion of law on the part of the witness, is incompetent, and without foundation; that witness has not qualified as an expert in in-

ternational diplomacy and has testified to no facts which would make him legally competent to give the foregoing opinion.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 28. Respondents further offer to prove by said witness that it is his opinion and firm belief that if it were not for the treaty of 1925 and governmental action taken thereunder said interests or authorities would unquestionably have acquired the flowage easements necessary to the development and utilization of said storage reservoir, and that it would have been entirely practicable for them so to do.

Mr. Harries: 28. The Government objects to this testimony on the ground that it is without any foundation; is speculative and conjectural; and the opinion of the witness is immaterial, since as a matter of law the action of the interests described would not have affected the market value of the properties involved. The testimony is further objected to as a conclusion for which no foundation has been laid; and as being completely refuted by the fact that such authorities referred to did not even seek to acquire such easements.

The Court: The objection is sustained.

Mr. Lewis: Exception.

68 Mr. Lewis: 29. Respondents further offer to prove by said witness that the reason for the opinion expressed by him in the foregoing offer of proof is that said storage reservoir is of such substantial advantage and benefit to the interests or authorities controlling or operating power projects at the outlets of said lake and in the Winnipeg River that it would be to their best interests as a matter of sound business policy to acquire said flowage easements.

Mr. Harries: 29. The Government objects to this testimony as speculative and conjectural and without any foundation by proof of knowledge of the costs of plant, site, operation, personnel, taxes, financing, marketability and possible earnings.

The Court: Objection sustained.

Mr. Lewis: Exception.

Mr. Lewis: 30. Respondents further offer to prove by said witness that there is no general market and no general

market value for flowage easements as those terms are customarily used and understood. That the fair value or the fair market value, as it is sometimes called, for flowage easements is, as a matter of common practice in connection with projects involving such easements, arrived at on the basis of the particular facts and circumstances affecting each individual case.

Mr. Harries: 30. The Government objects to the foregoing testimony except insofar as it corroborates the Government's testimony that market values have not been affected by the storage possibilities of the lake, the grounds of the objection are (1) that the statement that there is "no general market" is a conclusion of law, has no proper foundation and is incompetent; (2) that the absence of an "easement market" is immaterial in condemnation proceedings
69 where the issue is the extent of damage to the entire tract on which the easement is imposed; (3) that a common practice cannot overcome the well defined legal measure of market value as the difference in value of the whole property affected, before and after the taking.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 31. Respondents further offer to prove by said witness that there is an established custom and practice in connection with such projects whereby the fair value, or the so-called fair market value, of flowage easements is arrived at. That he knows what said custom and practice is, and that it is as set forth in the next preceding offer of proof.

Mr. Harries: 31. The Government objects to the admission of this testimony for the reason that it frankly admits that "fair value" is not the same as "market value"; and that all testimony of this witness as to values is therefore wholly incompetent.

The Court: Objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 32. Respondents further offer to prove by said witness that in his opinion, based upon his experience and knowledge, the fair value or so-called fair market value of the flowage easements necessary to be acquired for the utilization of the Lake of the Wood storage reservoir as contemplated by the treaty of 1925 would be arrived at, in ac-

cordance with said custom and practice, if said flowage easements were sought to be acquired by the interests or authorities operating or controlling the power projects, through the usual methods of negotiation and bargaining between the willing seller and a willing buyer, both fully informed
70 and under no compulsion to buy or sell. That the fair value or so called fair market value so arrived at would be the result of the exercise of the best judgment on either side, and would represent a value somewhere between the value of the lands to their owners and the value of the easements to the interests or authorities seeking to acquire them. That said fair value or so called fair market value would not be based upon nor determined by the necessities of the interests seeking to acquire them nor upon the profits or benefits which such interests might derive therefrom, nor would it be based upon the use which the owners of said lands might at the time be able to make thereof, but that it would be determined and arrived at in the manner above described.

Mr. Harries: 33. The Government objects to this testimony as a conclusion of law; as being without proper foundation; that the method named refers to an entire reservoir collectively, and not to individual parts thereof and has no relation to taking easement by condemnation; and upon the ground that it is immaterial since the impossibility of unifying ownership of the necessary rights on the lake shore preclude the allowance of any added value by reason of storage possibilities, as a matter of law.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 33. Respondents further offer to prove by said witness that from his said knowledge and experience and particularly from his acquaintance with the facts and circumstances affecting said flowage easements and the development of said storage reservoir, he has formed an opinion as to the fair value or so called fair market value of the three flowage easements involved in these proceedings.

71 Mr. Harries: To which the government objects as immaterial.

The Court: The objection is sustained

Mr. Lewis: Exception.

Mr. Lewis: 34. Respondents further offer to prove by said witness that the fair value or so called fair market value

of the flowage easements upon the respective lands of the respondents in the present proceeding is as follows:

On the lands of Elias Olson, $10,800;

On the lands of Harry Brewster, $13,300;

On the lands of Randor G. Karlson $9,400.

Mr. Harries: 34. The Government objects to the foregoing testimony upon the grounds that (1) "so called fair market value of the flowage easements" is not a proper measure of value; (2) that the value of an easement is not a proper measure of damage in condemnation proceedings but the difference in value of the entire tract must be considered; (3) that no proper foundation has been laid; (4) that the testimony is incompetent; (5) that upon each ground hereinafter stated as an objection to each item in respondents offer of proof and set forth in full at pages following Meyer's testimony.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 35. Respondents further offer to prove by said witness that he has considered the fair values or so called fair market values of said flowage easements as set forth in the foregoing offers of proof, together with the corresponding fair value or so called fair market values of all the other flowage easements necessary to the development and utilization of said reservoir, as compared with the results
72 which may be derived by the purchasers from the acquisition and utilization of said easements, and also with the use or uses to which the owners of said lands might devote the same for other than flowage purposes.

Mr. Harries: 35. The Government objects to this testimony upon the ground that the witness has not shown himself qualified to appraise uses of the lands for purposes other than power.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 36. Respondents further offer to prove by said witness that he has made the comparison mentioned in the preceding offer of proof for the purpose of checking the soundness of his opinion as to the fair value or so called fair market value of said easements, and for the purpose of check-

ing the soundness of his opinion that the interests or authorities owning or controlling the power projects would acquire and utilize said flowage easements, if the United States had not undertaken by the treaty to acquire the same.

Mr. Harries: 36. To which the government objects upon the ground that the witness is lifting himself by his bootstraps and checking his opinion by his comparison and his comparison by his opinion.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 37. Respondents further offer to prove by said witness that as a result of his checking and comparisons made as set forth in the foregoing offers of proof, based upon his knowledge and experience, he has determined that the advantage and benefit which will be derived by the interests or authorities operating and controlling said power projects on account of the utilization of said flowage easements and said reservoir will exceed in value by more than two
73 fold the entire amount which said flowage easements required for said reservoir would cost, based upon fair values or so called fair market values arrived at in the manner heretofore described by said witness.

Mr. Harries: 37. To which the Government objects upon the ground that it assumes the cost of acquiring flowage easements.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 38. Respondents further offer to prove by said witness that the interests or authorities utilizing said flowage easements and said reservoir would reasonably be able to realize an additional annual profit or benefit as a result of such utilization exceeding $1,200,000, after allowing interest at the annual rate of eight per cent on the investments required for the acquisition of said flowage easements and reservoir on the basis of the values arrived at as heretofore described.

Mr. Harries: 38. The Government objects to this testimony upon the ground that no foundation has been laid; and that the testimony is speculative and conjectural and based upon facts not in evidence; that it assumes without any proof the cost of developing power, the effect of rate-fixing, operation and capital costs, and is incompetent; it assumes an an-

nual rate of earnings without foundation by proof of market possibilities; does not include the time for which such earnings may be expected to continue; and is irrelevant because as a matter of law no undertaker could make the development because of the impossibility of unifying the necessary shore rights. The government also objects to all of the proposed testimony of Gardner S. Williams and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

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The Court: The objection is sustained.

Mr. Lewis: Exception."

That thereafter respondents offered in evidence Respondents' Exhibit 44, the same being respondents offer to prove certain facts as set forth in said exhibit by witness LINUS LANDBY. Said Exhibit 44, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"Mr. Lewis: Respondents offer to prove by the witness Linus Landby the facts set forth in evidence in respondents' Exhibit 44, and state to the court that if the witness Linus Landby were permitted to testify that he would testify to the facts set forth in said exhibit.

Mr. Harries: The government objects to the offered testimony upon the grounds set forth in the typewritten sheet attached to copy of the offered testimony of Mr. Landby, and I undersand that the reporter will mark as exhibits all of the objections presented by the government, so that they may appear following the testimony offered on the part of the respondents.

And I ask to have this marked as a Government's Exhibit.

(Document marked Government's Exhibit 102 for identification by the reporter.)

Mr. Lewis: 39. Respondents offer to prove by the witness Linus Landby, duly sworn and on the stand ready to testify, that he has been a resident of Roseau County, Minnesota, for more than twenty years. That he is a farmer. That he is a son of A. M. Landby, who is a former state senator from Roseau County, and who was one of the residents of said county who took part in attempting to establish the rights of the owners of property flooded by

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the waters of the Lake of the Woods to compensation and damages for the use of said property for flowage and storage purposes. That during the year 1924 said Linus Landby purchased a tract of 120 acres, practically all of which is below contour 1064 on the shore of said lake. That said tract does not adjoin his farm upon which he resides, but is a considerable distance therefrom. That he purchased said tract solely because it was valuable and was reputed to be valuable for flowage and storage purposes. That he paid a larger sum for said tract than he otherwise would have paid on account of the fact that it was valuable and was reputed to be valuable for flowage and storage purposes. That he would not have purchased said tract at all except for such value and reputed value.

Mr. Harries: 39. To which the government objects upon the ground that the self-deception of the witness, and his ignorance of the law which had already conferred upon the United States a right to overflow his lands in aid of navigation to an unknown height, and his ignorance of other obstacles which rendered it impracticable as a matter of law to unify the ownership required for a reservoir, render it immaterial why he bought or what he paid more than he would have paid had he actually known the facts of which he was aware constructively, and in legal effect. The government also objects to all of the proposed testimony of Linus Landby and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The government's objection is sustained.

Mr. Lewis: Exception.

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76 That thereafter respondents offered in evidence Respondent's Exhibit 45, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness THEODORE F. SPREITER. Said Exhibit 45, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 45. (Document marked respondents' Exhibit 45 for identification by the reporter)

Mr. Lewis: Respondents now offer to prove by the witness Theo. F. Spreiter, the facts set forth for evidence in respondents' Exhibit 45, and I will state to the Court that if

such witness were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The government objects to such testimony upon the grounds as stated in the sheet attached to the copy of the proposed testimony of Mr. Spreiter, and ask to have it marked as government's Exhibit 103.

(Document marked General Government's Exhibit 103 for identification by the reporter.)

Mr. Lewis: 40. Respondents offer to prove by the witness Theodore F. Spreiter, duly sworn and on the stand ready to testify, that he is a resident of the village of New Port, Washington County, Minnesota, and is president of the Farmers Terminal State Bank of said village. That from 1912 to 1918 he was a resident of the village of Warroad, Roseau County, Minnesota, and was the organizer and cashier of the Security State Bank of said village. That through his connection with said bank he became acquainted with certain sales and transfers of lands along Lake of the Woods below contour 1064 in said county during said period.

That the number of said sales was small. That in
77 each instance with which he was familiar the sale and transfer was made as a forced sale and because the grantor was in financial distress.

Mr. Harries: 40. The Government objects to this testimony upon the following grounds: (a) neither the number of sales nor the fact of sales below contour 1064 is material because the lands affected lie above as well as below the level; (b) financial distress is a mental state as to which the witness is not qualified to testify; (c) witness does not profess to be familiar with all sales; (d) the characterization of sales as "forced" is a conclusion of law and/or fact and oral testimony is not the best evidence thereof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 41. Respondents further offer to prove by said witness that he knows of two or three such forced sales wherein the purchaser purchased the land in question solely because of its value and reputed value for flowage and storage purposes, and that he knows of his own knowledge that the purchaser paid a higher price for the land than he would have paid except for the fact that the land was valuable and was reputed to be valuable for flowage and storage purposes.

Mr. Harries: 41. The government objects to this testimony on the ground that motive of purchase is immaterial; and no foundation has been laid for proof thereof; on the ground that reputed values are immaterial if in fact such reputation was false because the required land could not be unified save by the joint action of National Sovereignties and if the hope engendered by such false repute was as a matter of law so speculative and conjectural that it could not influence market values. That such false repute ignored existing laws conferring a right of flowage on the United States in aid of navigation to an unknown water level and
78 hence the hope of unification could not as a matter of law enhance market values. The Government also objects to all of the proposed testimony of Theodore F. Spreiter and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer, as shown on [marginal] page 36 line 1 to [marginal] page 43 line 3 of this typewritten transcript.

The Court: The government's objection will be sustained.

Mr. Lewis: Exception."

That thereafter respondents offered in evidence Respondents Exhibit 46, the same being respondents offer to prove certain facts as set forth in said exhibit by witness BARNEY ARNESON. Said Exhibit 46, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

Mr. Lewis: I now ask to have this document marked as Respondents' Exhibit 46.

(Document marked Respondent's Exhibit 46 for identification by the reporter)

"Mr. Lewis: The respondents next offer to prove by the witness Barney Arneson the facts recited and set forth in Respondents' Exhibit 46, and state to the court that if said witness Barney Arneson were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to such testimony upon the grounds as stated upon the two typewritten sheets attached to the copy of the proposed testimony of Barney Arneson, and I ask to have it marked as General Government's Exhibit 104.

(Document marked General Government's Exhibit 104 for identification by the reporter.)

"Mr. Lewis: 42. Respondents offer to prove by the witness Barney Arneson, now on the stand, that he has
79 been a resident of Warroad, Minnesota, since 1897. That he lives on a farm in the vicinity of the village of Warroad and that he is also engaged in the fishing industry. That he is a married man with a family and that he owns several pieces of property both within and without the village of Warroad.

43. That he remembers the completion of the Norman Dam and the putting in of the stop logs in said dam during the year 1898. That he filed on a homestead in Roseau County not far from the village of Warroad in 1898, and that during the year 1899 his land, as well as other low-lying lands adjacent to the source of the Lake of the Woods, was flooded by the waters of said lake due to the presence and operation of the Norman Dam at one of the outlets of said lake.

44. That during the year 1899 and 1900 the property owners along the shores of the Lake of the Woods had made inquiry and investigation to ascertain the cause of said flooding and at that time learned that said lake was being used as a storage reservoir for the development of water power.

45. That on discovering that the waters of the Lake of the Woods were used for power purposes and that said lake was being used as a storage reservoir, and that the adjacent lands were being flooded and were used by the power companies to form said storage reservoir, it became a matter of common report, reputation, rumor and conversation among said property owners and among the residents in said area generally that the lands so flooded were of great value for storage purposes and bore such reputation, and that the said lands so flooded were more valuable than were the higher lands which were not flooded and that their highest value was for flowage purposes. That said lands so flooded were used by the power companies owning and operating the said Norman Dam
80 and shortly thereafter were used by other companies owning and operating dams and power plants at the other outlets of said lake and in the Winnipeg River as and for a storage reservoir to equalize the flow of said water for power purposes.

Mr. Harries: 42, 43, 44, 45. The Government objects to the foregoing testimony upon the grounds that rumors, etc. of value for flowage purposes and common report that such

values were highest are immaterial, since such rumor and report could not, as a matter of law, be reflected in market values because of the impracticability of unifying ownership of the flowage rights.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 46. That during the years 1903, 1904 and 1905 the said property owners organized themselves into an association for the purpose of controlling the use value of their said properties which were so being flooded and used by said power companies, and for the purpose of obtaining relief from said continued trespass on their property by bringing about either a discontinuance of said trespass or the payment of just compensation therefor. That said association employed counsel to advise and to represent them, and that among the counsel so employed were Mr. William Taylor, The Honorable Halvor Steenerson, Member of Congress from the Ninth Minnesota Congressional District, Honorable Charles Loring, now a member of the Supreme Court of the State of Minnesota, the Honorable G. A. Youngquist, now Assistant United States Attorney General, C. E. Berkman, Esq., an attorney at law, Chisholm, Minnesota, Messrs. Middleton & Middleton, Attorneys at Law of Baudette, Minnesota, Honorable Albert Chilgren, Attorney at Law of Baudette, Minnesota, Mr. Bert Hanson, The Honorable
81 Julius J. Olson, now a judge of the District Court of the State of Minnesota for the Fourteenth Judicial District, and the attorneys of record in these proceedings.

Mr. Harries: 46. Objected to as immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 47. That the said property owners at all times since 1903 or 1904 have been associated together and organized and have been represented by legal counsel. That during all of said period from 1899 down to the present time, it has been a matter of common report, rumor, reputation and conversation among the said property owners and other residents of said area that the said lands so flooded possessed a high value for flowage purposes and that they were more valuable for flowage purposes than for any other purpose. That during substantially all of said period it was a matter of common report. rumor, reputation and conversation among said

property owners and other residents of said area that the use of said lands for flowage and storage purposes as so made by said power companies entitled the owners of said land to recover substantial compensation and damages on account of said use.

Mr. Harries: 47. To this testimony the Government objects on the same ground as stated in its objection to paragraphs 42, 43, 44 and 45.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: We further offer to prove by the said witness Barney Arneson that for a long period of years he has served as official assessor of large areas bordering on the shores of the Lake of the Woods and that accordingly he became intimately acquainted with said properties so flooded and the owners thereof; that he has during all of said times
82 made a close observation and study of transfers of property within the said area so flooded and that he has never known or heard of a flowage easement being either bought or sold along the shores of the Lake of the Woods.

Mr. Harries: 48. To which the Government objects upon the ground that such testimony is immaterial and does not go to the proper measure either of damages or market value, inasmuch as the award in condemnation must be based on the diminution of value of the entire tract affected and not upon the market price of a flowage easement.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 49. Respondents further offer to prove by said witness Arneson that the sale and transfer of lands within said flooded area had been extremely infrequent and that he has conducted an investigation and has ascertained the facts and circumstances surrounding a large number of said transfers and that in practically every instance of such transfer the said transfer was made on account of financial distress or as a forced sale.

Mr. Harries: 49. Objected to as contradictory; a "large number" and "extreme infrequency" cannot co-exist; objected to as not the best evidence of "forced sales", as incompetent in alleging the state of mind described as "financial distress";—it may have been only embarrassment.

The Court: Objection sustained.

Mr. Lewis: Exception.

Mr. Lewis: 50. Respondents further offer to prove by said witness Arneson that in many of the sales and transfers referred to in the foregoing paragraph and offer of proof, the witness knows that said sales and transfers were made to persons who acquired said property on account of
83 their value for flowage and storage purposes; that in each instance the person so purchasing and acquiring said lands which had been so flooded paid a larger price therefor on account of their value and reputed value for flowage purposes, and that except for the fact that said lands were reputed to be valuable for flowage purposes the persons so acquiring the same would not have purchased them at all.

Mr. Harries: 50. To which the Government objects upon the following grounds: It is immaterial that the buyers referred to acted under a mistake of law as to the practical possibility that adaptability for flowage could or did affect the market value of the property transferred.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 51. Respondents further offer to prove by said witness Arneson that in the year 1920 he owned and resided on his own homestead, upon which he had filed in the year 1898 or thereabouts, and on which he had resided ever since, which were riparian lands bordering on said lake, and that during said year he purchased a tract of 160 acres practically all of which was below contour 1064, and that he purchased the said tract because of its value and reputed value for flowage and storage purposes, that he paid a larger price therefor than he would have paid except for said flowage and storage value and that he would not have purchased said tract at all except for the fact that he considered it valuable for flowage and storage purposes.

Mr. Harries: 51. To which the Government objects on the ground last above stated.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 52. Respondents further offer to prove
84 by said witness Arneson that the owner of said tract of land which he purchased, as mentioned in the fore-

going paragraph and offer to prove, was in financial distress at and prior to said sale and transfer; that a mortgage was due against said lands and that the sale and transfer was made on account of said owner's inability to meet the payments due on said mortgage.

Mr. Harries: 52. The Government objects to this as not being the best evidence; as immaterial; and on the ground that financial distress is not a gauge of market value, and as belying the claim in paragraph 51 that witness paid more than he otherwise would.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 53. Respondents further offer to prove by said witness Arneson that during the time when the investigations and hearings were being conducted by the International Joint Commission at Warroad and elsewhere with reference to Lake of the Woods prior to 1917, he attended a number of said hearings and testified as a witness thereat; that on numerous occasions he heard members and advisers of said International Joint Commission state in public meeting attended by a large number of property owners and residents of said area that said lands so flooded were more valuable for flowage and storage purposes than for any other purpose and that when the power resources of said Lake of the Woods basin were fully developed the flowage and storage rights of said lands so flooded would possess a value beyond the fondest dream of their owners; that said witness Arneson, as well as a large number of other property owners, stated to said International Joint Commission that he and they would not sell their said lands so flooded for any price representing their value for agricultural purposes.

Mr. Harries: 53. Objected to on the ground that "fondest dreams" are not a measure of market value, and statements to the International Joint Commission are immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 54. Respondents further offer to prove by said witness Arneson that following the publication and circulation of the final report of said International Joint Com-

mission in the year 1917, it was a matter of common report, rumor, reputation and conversation among the people generally residing in said area and among said property owners that said International Joint Commission had found and reported that the said lands so flooded were more valuable for flowage and storage purposes than for any other use or purpose.

Mr. Harries: 54. Objected to on the ground that rumor is not evidence, and the stated findings of the International Joint Commission are not the best evidence, and are immaterial; and its findings of a higher "use value" for storage is not a measure of market value. The Government also objects to all of the proposed testimony of Barney Arneson and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer, [marginal] page 36, line 1 to [marginal] page 43, line 3 of this typewritten transcript.

The Court: The objection will be sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 47.

86 That thereafter respondents offered in evidence Respondents' Exhibit 47, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness H. M. HENEMAN, said Exhibit 47, the government's objection thereto and the court's ruling thereon are as follows, exceptions being duly noted by and on behalf of respondents to each adverse ruling of the court;

"Mr. Lewis: I ask to have this exhibit marked as Respondents' Exhibit 46.

(Document marked Respondents' Exhibit 47 for identification by the reporter)

"Mr. Lewis: Respondents offer to prove by the witness H. M. Heneman, the facts set forth for evidence in Respondents' Exhibit 47, and state to the court that if said witness were permitted to testify, that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to the testimony of Mr. H. M. Heneman on the grounds as stated in the two typewritten sheets attached to the copy of his proposed tes-

timony. And may the record show, your Honor, that the objections on the part of the Government go to each specific item of proof offered by the respondents, as stated in the typewritten statements of objection.

And I ask to have the document marked as Government's Exhibit 105. (Document marked Government's Exhibit 105 for identification by the reporter.)

Mr. Lewis: 55. Respondents offer to prove by the witness H. M. Heneman, duly sworn and on the stand ready to testify, that he is a resident of the village of Warroad, Roseau County, Minnesota, and is cashier of the Security State Bank of said village, and has been such for 13 years last past. That during his entire period of residence in said village he has been familiar with the common report,
87 reputation and conversation among the people of said village and vicinity concerning the lands below contour 1064 on the shores of the Lake of the Woods which have been and are flooded and used for flowage and storage purposes in connection with the formation and maintenance of the Lake of the Woods storage reservoir. That for a number of years he has been secretary and treasurer of the Cloverleaf Federal Farm Loan Association. That in connection with his duties as cashier of said bank and as secretary of said association, he became and was during the entire period of his said residence in said village familiar with a very large proportion of the sales and transfers of property in the vicinity of Lake of the Woods in said Roseau County during said time.

Mr. Harries: 55. The Government objects to the reception of the proposed proof on the ground that it assumes a common report, reputation and conversation without proof thereof; that such report, reputation and conversation are immaterial, irrelevant and incompetent; that these condemnation proceedings are not limited to lands below contour 1064.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 56. Respondents further offer to prove by said witness that only a very small number of sales and transfers of land below contour 1064 have been made in Roseau County during the period of his said residence in said county. That he personally is acquainted with the facts and circumstances connected with a very large proportion of such transfers. That he knows of his own knowledge

that in the large majority of cases such sales and transfers as have been made on lands below contour 1064 were
88 made for the reason that the grantors were in financial distress and that such sales were made under such circumstances as to make them forced sales.

Mr. Harries: 56. The Government objects to this testimony on the ground that the number of sales of lands below contour 1064 is immaterial; that the financial distress of the grantors of such lands or any other lands is immaterial; that testimony by this witness as to the state of mind of the grantors is incompetent, and no foundation has been laid for proof thereof; that the characterization of sales as forced sales is a conclusion for which no foundation has been laid, and is not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 57. Respondents further offer to prove by said witness that he has never known or heard of a flowage easement being either bought or sold in Roseau County. That he is familiar to some extent with the transfers of land in the vicinity of Lake of the Woods in Lake of the Woods County, and that he has never known or heard of a flowage easement being either bought or sold in said county.

Mr. Harries: 57. The Government objects to this testimony as being immaterial and as not going to the proper measure of damage in this condemnation proceeding; and on the ground that the testimony has no tendency to prove that no such sales have been made; and upon the grounds stated by the Government at pages 233 to 242 of the record, [marginal] page 36, line 1 to [marginal] page 43, line 3 of this typewritten transcript.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 58. Respondents further offer to prove by said witness that in a number of cases of the sale and
89 transfer of tracts of land in Roseau County including lands below contour 1064, he directly assisted and counseled the parties in connection with the transaction, and has personal knowledge of all the details thereof. That in connection with said sales and transfers including lands below contour 1064 the use and value of such lands for flowage and storage purposes constituted a material consideration affecting such sales and transfers. That such use and value

for flowage and storage purposes caused the purchasers in said transactions to pay a higher price for said lands than they otherwise would have paid except for such use and value. That the value and reputed value of said lands below contour 1064 for flowage and storage purposes was a subject of negotiation in the consummation of said sales and transfers.

Mr. Harries: 58. The Government objects to this testimony as being too indefinite to be considered; as being hearsay and a conclusion as to the causes of prices paid; on the ground that the use of the lands in Roseau County constituting a part only of the lands required for a reservoir; and leaving out of account lands in Lake of the Woods County, and Canada, cannot furnish any measure of the value of any separate tract or group of tracts less than the whole number required.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 59. Respondents further offer to prove by said witness that only a very small number of sales and transfers of lands below contour 1064 have been made in Roseau County during the period of his residence. That he is personally acquainted with a large percentage of such sales and transfers, and that by far the larger portion of said sales and transfers with which he is familiar were
90 made for the reason that the grantors therein were in financial distress, and that said sales were in fact forced sales. That these sales and transfers referred to in the consummation of which he participated were likewise forced sales, and were made for the reason that the grantors therein were in financial distress.

Mr. Harries: 59. The Government objects to this testimony on the ground that the distress of the grantors is immaterial and no foundation has been laid for proof of the mental state of the grantors; that the description of sales as "forced" is a conclusion and not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 60. Respondents further offer to prove by said witness that during the period of his residence in Roseau County he was familiar with a large proportion of the sales and transfers of real estate in the vicinity of Lake

of the Woods in said county, and that he never knew or heard of a flowage easement being bought or sold.

Mr. Harries: 60. The Government objects to this testimony as immaterial, as not going to the true measure of damage, which must be based upon the effect of the taking upon the entire tract and must not be limited solely to the land within the physical boundaries of the space that is overflowed; for the easement carries with it all incidental appurtenances and involves all consequential damage. For example, if the easement cut off a road leading to the land on which the easement was imposed, or submerged the foreshore of a cliff so that boats could no longer land on the property, these facts must be regarded in appraising the damage. If it be said that the road and boat landing are not involved in the highest use to which the land is
91 adapted, respondent is thrown back on the basic claim that availability could not, as a matter of law, affect market prices because of the practical impossibility of uniting ownership of all lands or even of all easements except by the intervention of eminent domain. The Government also objects to all of the proposed testimony of H. M. Heneman as to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer. [marginal] page 36, line 1, to [marginal] page 43, line 3 of this typewritten transcript.

The Court: Yes, the record may so show, and the objection will be sustained.

Mr. Lewis: Exception."

That thereafter respondents offered in evidence Respondents' Exhibit 48, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness HALVOR ROBBERSTAD, said Exhibit 48, the government's objection thereto, the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"Mr. Lewis: I will ask to have this marked as respondents' Exhibit 48.

(Document marked respondents' Exhibit 48 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness Halvor Robberstad the facts set forth in Respondents' Ex-

hibit 48, and state to the court that if Mr. Robberstad were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to such testimony upon the grounds set forth in its written statement of
92 objections attached to the proposed testimony of Halvor Robberstad, and we ask to have this marked as Government's Exhibit 106.

(Document marked Government's Exhibit 106 for identification by the reporter.)

Mr. Lewis: 61. Respondents offer to prove by the witness Halvor Robberstad, duly sworn and on the stand ready to testify, that he is a resident of the village of Warroad, Roseau County, Minnesota. That for more than two years he has been U. S. Postmaster in said village and that for a number of years he resided in the village of Roosevelt in said County, and that for a number of years he was the president of the village council of said village. That after transferring his residence from Roosevelt to Warroad he was for a number of years president of the village council of Warroad. That he has lived in said county of Roseau during the past twenty-five years.

62. Respondents further offer to prove by said witness that during said entire period of twenty-five years he has been familiar with the facts that certain lands in the vicinity of Lake of the Woods were flooded and used for flowage and storage purposes in connection with the formation of a storage reservoir in said lake in the development of water power. That is a matter of common report, reputation, and conversation among the people of said Roseau County generally that said lands so flooded were very valuable on account of their use for flowage and storage purposes, and the said lands were more valuable for said purposes than for any other purpose.

Mr. Harries: 61-62. To all of which the government objects as immaterial, inasmuch as value for storage could not as a matter of law be reflected in market values because of the impracticability of realizing the values alleged.

93 The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 63. Respondents further offer to prove by said witness that in 1917 he purchased an eighty acre tract of land all of which is below contour 1064 on the shore of said

lake. That said tract was completely flooded during the preceding year, 1916, and that considerable portions of the same were flooded at the time he purchased it in 1917. That he purchased said tract solely on account of its value and reputed value for flowage and storage purposes. That he paid a larger price for said land than he otherwise would have paid because of its availability and use for such flowage and storage purposes. That in fact he would not have purchased said land at all except for the fact that it was so available and was so used.

64. Respondents further offer to prove by said witness that his grantor of said tract at the time of said sale and transfer was in financial distress and that said transfer was the result of a forced sale.

Mr. Harries: 63-64. The Government objects to the evidence in the two foregoing paragraphs on the ground that it is incompetent, without proper foundation, purports to describe a state of mind, is not the best evidence of a forced sale, is immaterial and irrelevant to the issue of damages because as a matter of law, of which witness was constructively aware, the value for storage purposes could not affect the market value of the land.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 65. Respondents further offer to prove by said witness that for a number of years between 1919 and 1929 he served as a member of a committee of the
94 Commercial Club of the village of Warroad, which committee was charged with the responsibility of protecting the rights and interests of the Village of Warroad in connection with the artificial raising of the waters of said Lake of the Woods.

Mr. Harries: 65. Objected to as immaterial.

The government also objects to all of the proposed testimony of Halvor Robberstad and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer, [marginal] page 36, line 1 to [marginal] page 43, line 3 of this typewritten transcript.

The Court: The objection is sustained.

Mr. Lewis: Exception."

That thereafter respondents offered in evidence Respondents' Exhibit 49, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness JOHN A. KENNEDY, said Exhibit 49, the government's objection thereto, the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondent to each adverse ruling of the court:

"Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 49.

(Document marked as Respondents' Exhibit 49 for identification by the reporter.)

Mr. Lewis: Respondents next offer to prove by the witness John A. Kennedy the facts set forth in respondents' Exhibit 49, and state to the Court that if Mr. Kennedy were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to the proposed testimony of John A. Kennedy on the grounds stated in the typewritten sheet attached to his proposed testimony
95 and I ask to have this marked as Government's Exhibit 107.

(Document marked Government's Exhibit 107 for identification by the reporter.)

Mr. Lewis: 66. Respondents offer to prove by the witness John A. Kennedy, duly sworn and on the stand ready to testify, that he is a resident of the village of Baudette in the Lake of the Woods County, Minnesota. That for thirty years he has been deputy U. S. Collector of Internal Revenue at said village of Baudette. That he first became interested in the vicinity of Lake of the Woods in the year 1886 and that for a number of years thereafter he was engaged in the cruising and timber business in said region.

67. Respondents further offer to prove by said witness that shortly after the placing of the stop logs in the Norman Dam in 1898 the low lands along the shores of said lake became flooded, and thereafter were used for flowage and storage purposes in connection with the development of water power. That during the early years of said period of flooding of said land he did not own any real estate in the vicinity of said lake, but that he remembers distinctly that the fact of the flooding of said land was the subject of a great deal of public and private discussion during said years, and that it

was a matter of common report, reputation and conversation during said years following 1898, and that it was a matter of common report, reputation and conversation during said years among the people residing in the vicinity of Lake of the Woods generally that said lands so flooded in connection with the development of water power were of higher value on that account and were more valuable for flowage and storage purposes than for any other use or purpose.

66-67. The Government objects to the testimony of John A. Kennedy on the ground that discussion, report and
96 reputation of high values which as a matter of law could not be reflected at market values are immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 68. Respondents further offer to prove by said witness that on or about the year 1910 he became a member of the association of property owners known as the Low Water Association, and that from that time down to the present time he has been a member of said Association of said property owners. That said association employed counsel to represent it and to represent the rights and interests of the property owners whose lands were so flooded. That said association at all times were active in an effort to collect compensation and damages for the use of said lands so flooded in the formation of a storage reservoir in said lake and also in obtaining for the members of said association the fair value of said lands for flowage and storage purposes. That in that connection said association employed the services and obtained the advice of men skilled and experienced in the determination of the value of flowage easements and the value of the use of property so used for flowage and storage purposes.

Mr. Harries: 68. Objected to as immaterial.

The Government also objects to all of the proposed testimony of John A. Kennedy and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer, [marginal] page 36, line 1 to [marginal] page 43, line 3 of this typewritten transcript.

The Court: Objection sustained.

Mr. Lewis: Exception."

97 That thereafter respondents offered in evidence Exhibit 50, the same being respondents offer to prove certain facts as set forth in said exhibit by witness GEORGE C. NEWTON, said Exhibit 50, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 50.

(Document marked Respondents Exhibit 50 by the reporter for identification.)

Mr. Lewis: Respondents offer to prove by the witness George C. Newton the facts stated and set forth in Respondents' Exhibit 50, and state to the court that if Mr. Newton were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: Subject to additional objections and further offers the Government objects to the testimony offered and to each item therein upon the grounds set forth in two typewritten sheets attached to the proposed testimony of George C. Newton and I asked to have this document marked as Government's Exhibit 108.

(Government's Exhibit 108 marked for identification by the reporter.)

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 69. Respondents offer to prove by the witness George C. Newton, duly sworn and on the stand ready to testify, that he is forty-five years of age. That he is a resident of Iron Mountain, Michigan, and has lived there for the past ten years. That he was graduated from the University of Wisconsin in 1907 in the mechanical engineering
98 course, and later took advanced work at said university in mechanical engineering, obtaining the advanced degree of mechanical engineer in 1921. That he is a member of the following engineering societies: American Society of Civil Engineers, being a charter member of the Duluth section of said society, American Institute of Mining and Metallurgical Engineer, Lake Superior Mining Institute. That he is a director of the Pigeon River Lumber Company, owning and operating a number of dams on the Pigeon River, being

boundary waters between the State of Minnesota and the Province of Ontario, Canada. That he has had twenty-five years general engineering experience along various lines. That during the past seventeen years he has had special experience in the investigation and construction of water power, flowage and reservoir projects, and in the appraisement, purchase, and sale of flowage easements and other properties connected said such projects. That during said period he has personally engaged in or has been connected with the appraisement, purchase, or sale of upwards of twenty-five flowage or storage reservoirs, among which are the Cloquet River Reservoirs of the Minnesota Power and Light Company in St. Louis County, Minnesota, the Minnesota Power and Light Company's project at Kaweshiwi Falls, on Falls Lake, near Winton, Minnesota, the Menominee River developments on the border between Michigan and Wisconsin, the Dead River and Hoist Dam Reservoirs of the Cliffs Power Company in Michigan, the Paint River Reservoir in Michigan, the Flambeau Reservoir of the Chippewa and Flambeau River in Wisconsin, the North Fowl and South Fowl and Royal Lakes Reservoir on the Pigeon River on the international border between Minnesota and Canada, the Arrow Lake Reservoir at the headwaters of Arrow River, a tributary of the
99 Pigeon River. That during the past eleven years he has been engaged as a consulting engineer, specializing in hydroelectric and mining projects. That during said period he has served as consulting engineer for the following companies, among other: Pickands-Mather Company of Cleveland, Ohio, Heineman Land & Power Company of Wausau, Wisconsin, B. C. Neely, of Crystal Falls, Michigan, Stevenson Estate of Milwaukee, Wisconsin, and Pigeon River Timber Company and other concerns interested in the development of power on the Pigeon River and tributaries.

70. Respondents further offer to prove by said witness that he is personally acquainted with the promotion and development of a number of hydroelectric projects in international boundary waters between the United States and the Dominion of Canada, among which are the St. John River Power Company project in the St. John River, being boundary waters between the State of Maine and the Province of New Brunswick, and the projects of the Pigeon River Lumber Company in the Pigeon River, being a part of the International boundary waters between the State of Minnesota and the Province of Ontario. That he is acquainted with the facts pertaining to the physical and international questions

and aspects involved in said development in international waters.

71. Respondents further offer to prove by said witness that he is well acquainted with the Lake of the Woods. That during the past two years he has owned and operated on said lake a cabin power boat for pleasure purposes, and has made numerous cruises in said boat throughout said lake and has become thoroughly familiar therewith and with the storage reservoir thereof. That he has made a thorough examination and study of the drainage area of said
100 lake and reservoir and of all physical facts, features, and questions affecting or involved in the development and use of said reservoir. That he has studied and become familiar with the document known as Water Resources Statements No. 3, of the Dominion Water Power Branch, Department of the Interior of Canada, published in 1915, entitled "Winnipeg River Power & Storage Investigations," by J. T. Johnston, also the document known as Water Power Resources Paper of the Department of the Interior of Canada, Dominion Water Power and Reclamation Surveys, Nos. 31, 54 and 57, as well as considerable other literature and engineering and statistical data and information relating to the Power resources and developments of the Lake of the Woods and the Winnipeg River. That he has visited and inspected the power projects at the outlets of the Lake of the Woods and in the Winnipeg River, and that he knows the power capacities of said Lake and river and the extent of the development thereof up to the present time. That he has visited the city of Winnipeg and the Villages of Kenora and Rainy River, and intervening points in Canada, and the Villages of Warroad, Baudette and intervening points in the State of Minnesota as well as many other points around the shores of Lake of the Woods in Minnesota and Canada. That he is familiar with the character of the lands involved in these condemnation proceedings.

Mr. Harries: 71. The Government objects to the use of Water Resources Papers and other undescribed documents as hearsay, not affording opportunity for examination, and as untested as to accuracy.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 72. Respondents further offer to prove
101 by said witness that he has heard or has read the official reporter's transcript of all the testimony given by Adolph F. Meyer in this proceeding relating to the

facts and conditions of the Lake of the Woods, of the watershed of said lake, of the storage reservoir of said lake, of the Winnipeg River, of the power developments and other works in said lake and river, of the control that has been exercised and the use that has been made of the waters of said lake and river and particularly of the storage reservoir of said lake by means of said power developments and other works; also the testimony of said Adolph F. Meyer as to the facts and conditions of the resources and capacities of all of said waters for power and other purposes.

Mr. Lewis: 73. Respondents further offer to prove by said witness that he is familiar with the rules, regulations and practice of the International Joint Commission, the Federal Power Commission of the United States, and the Department of Lakes, Forests, and Mines of the Province of Ontario, Canada, with reference to the development and establishment of storage reservoirs, power projects and other projects in international boundary waters. That he has prepared applications for such projects for presentation of said International Joint Commission and for other authorities.

Mr. Lewis: 74. Respondents further offer to prove by said witness that the physical and international aspects of the development and use of the Lake of the Woods reservoir are similar in character to the physical and international aspects of said St. Johns River Power Company development, which has been carried out by private enterprise under authorization of said International Joint Commission, and
which involves the construction of a dam entirely
102 within the Province of New Brunswick, Canada, overflowing lands both in said province and in the State of Maine.

Mr. Harries: 74. The Government objects to this testimony on the ground that the testimony relative to the St. John River is not sufficiently specific to afford a basis for qualification for comparison with the Lake of the Woods.

Mr. Lewis: 75. Respondents further offer to prove by said witness that he knows of no reason why the flowage easements required for the Lake of the Woods reservoir could not be utilized and the storage capacity of said reservoir developed by private enterprise without governmental aid or co-operation other than such authorization as the Governments of the United States and Canada have extended and granted as a matter of common practice pursuant to the rules and regulations of the International Joint Commission

and other authorities which have been mentioned. That he is of the opinion that said flowage easements and storage capacity could have been so utilized and developed by private enterprise.

Mr. Harries: 75. While the Government admits that the witness has no knowledge of the obstacles to utilization of the storage capacity of the lake, the Government objects to evidence that this witness "knows of no reason why flowage easements required for the Lake of the Woods reservoir could not be utilized and the storage capacity of said reservoir developed by private enterprise" upon the ground that this lack of knowledge by the witness has no tendency to prove the practicability of such utilization and development; or that it enhanced market values of the shore lands; and further objects to the testimony as stating a conclusion for which no proper foundation has been laid.

103 The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 76. Respondents further offer to prove by said witness that he has had extensive experience during the past seven years in buying and selling flowage rights and easements on his own account or on account of the companies in which he was interested or on account of clients whom he represented. That during said period he has been engaged in or directly connected with the appraisement, buying and selling of flowage easements and storage rights totalling in value and price in the neighborhood of ten million dollars.

That during said period he has had extensive experience in connection with the sale, purchase, and acquisition of flowage rights and easements without the intervention of the exercise of the right of eminent domain, and that in the greater part of such transactions with which he has been connected the right of eminent domain was not exercised. That the State of Michigan, where he has had extensive experience in connection with such transactions, the right of eminent domain was not available to corporations or companies for the purpose of developing storage reservoirs or water power for a period of sixty years or more prior to the year 1928. That he knows of his own knowledge that there has been no condemnation of flowage rights of easements in the State of Michigan by such corporations or companies for the past sixty years or more up to the present time, but that nevertheless during said period many large and important storage reservoirs have been created and developed by such corporations

and companies in said state, involving the acquisition in connection with various single projects of many hundreds of separate easements belonging to separate and distinct property owners.

104 Mr. Harries: 76. The Government objects to this evidence upon the ground that it is irrelevant and immaterial and has no bearing upon the valuation of lands in the State of Minnesota bordering on international waters; and further objects to the testimony as stating conclusion of law.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 77. Respondents further offer to prove by said witness that it is his opinion that it would have been entirely practicable and feasible to acquire said flowage rights and easements necessary to the formation of a storage reservoir such as has been formed in the Lake of the Woods up to contour 1064 by private enterprise and without invoking or resorting to the exercise of the right of eminent domain.

Mr. Harries: 77. The Government objects to this testimony upon the ground that it states a legal conclusion; that no foundation has been laid by stating the elements to be taken into account; and upon the ground that the evidence shows as a matter of law that it would not have been practicable or feasible for private enterprise to attempt to form a reservoir; and upon the ground that the opinion of the witness is immaterial inasmuch as the practical possibility of completing the enterprise was as a matter of law too remote to affect market value.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 78. Respondents further offer to prove by said witness that there is no market value for flowage easements or for flowage or storage rights in the State of Minnesota and other northwestern states, within the usually accepted meaning of the term "market value". That the value of flowage easements and storage rights for storage
105 reservoirs is determined as a matter of custom and practice by reference to the special facts and circumstances involved in each instance. That there is a certain custom and practice recognized and followed by hydraulic engineers and by appraisers, owners, and users of flowage ease-

ments and storage rights, whereby the value of such easements and rights is determined. That he knows what said certain custom and practice is.

Mr. Harries: 78. The Government objects to the evidence in the first sentence of the foregoing paragraph upon the ground that it constitutes a conclusion of law; that no foundation has been laid for this testimony; that custom and practice cannot overcome a settled principle of law that damages in condemnation proceedings are to be measured by the difference in market value of the property affected by the condemnation.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 79. Respondents further offer to prove by said witness that according to said custom and practice the value of flowage easements and storage rights for storage reservoirs is arrived at by the exercise of judgment by persons skilled and experienced therein, based upon engineering experience, taking into consideration the availability for use of such easements and storage rights, the relative proximity in point of time of such use and the economic value of such use.

Mr. Harries: 79. The Government objects to this evidence upon the ground that engineering experience is not a prerequisite to the determination of market value; that the economic value of a "use" is not the measure of damage in these condemnation proceedings; and that the foregoing testimony is immaterial.

106

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 80. Respondents further offer to prove by said witness that the value of flowage easements and storage rights may be appraised with much greater certainty where the reservoir of which such easements form a part has been actually formed and is in existence, and where the use thereof has actually been determined.

Mr. Harries: 80. To which the government objects on the ground that the testimony is immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 81. Respondents further offer to prove by said witness that he has made a thorough examination, inspection, and study extending over a period of three years of the Lake of the Woods and its principal drainage area, of the dams, power plants and other works at the outlets of said lake and in the Winnipeg River, of the possible sites and power developments at said outlets and in said river, of the flows of waters into and out of said lake, of the storage reservoir formed in said lake, and of the operation and use of said storage reservoir. That through said examination, inspection, and study he has become familiar with and knows the uses of said storage reservoir which are immediately available and the possible uses to which the same may be put.

Mr. Lewis: 82. Respondents further offer to prove by said witness that he has made an examination and appraisal of the lands upon which it is necessary to acquire a flowage easement up to contour 1064 for said storage reservoir and that he knows the fair value thereof. That he has
107 made an examination and appraisal of the flowage easement sought to be acquired in these proceedings on the lands of Elias Olson, Harry Brewster and Randor G. Karlson, up to contour 1064, as described in the petition herein, and that he knows what is the fair value of each of said easements, or what is sometimes referred to as the fair market value of said easements, considering that there is no actual general market for such easements, as the term "market" is commonly used.

Mr. Lewis: 83. Respondents further offer to prove by said witness that the fair value of said flowage easements, sometimes referred to as the fair market value, as previously stated, is as follows:

On the lands of Elias Olson $11,200;

On the lands of Harry Brewster $18,000;

On the lands of Randor G. Garlson $12,200.

Mr. Harries: 83. The Government objects to the foregoing testimony upon the ground that no sufficient foundation has been laid, but that on the contrary the witness, in stating that there is no general market for the property he values, clearly shows that he is incompetent to testify as to market values, which alone constitute the measure of damages in

this case. The Government further objects to the testimony of values by this witness upon the grounds that adaptability for flowage purposes could not, as a matter of law, have affected market values because of the practicable impossibility of carrying out the project without the intervention of eminent domain and the formation of international agreements.

* * * *

The Government also objects to all of the proposed testimony of Gardner S. Williams and George C. Newton,
108 and to each item thereof, upon each of the grounds stated immediately after the offer to prove previously made by means of the witnesses Gardner S. Williams and George C. Newton, and Adolph F. Meyer.

The Court: The objection will be sustained.

Mr. Lewis: Exception."

That thereafter respondents offered in evidence Exhibit 51, the same being respondents' offer to prove certain facts as set forth in said Exhibit by witness H. C. HABSTRITT, said Exhibit 51, the government's objection thereto and the court's ruling thereon are as follows; exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"Mr. Lewis: I ask to have this document marked as Respondents' Exhibit number 51.

(Document marked Respondents' Exhibit 51 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness H. C. Habstritt the facts set forth in Respondents' Exhibit 51 and state to the court that if Mr. Habstritt were permitted to testify he would testify to the facts set forth in said exhibit.

Mr. Harries: The Government objects to the admission of the evidence of the proposed testimony upon the grounds set forth in the typewritten sheets attached to the copy of the Exhibit just offered by respondents, and I ask to have them marked as Government's Exhibit 109.

(Document marked Government's Exhibit 109 for identification by the reporter.)

Mr. Lewis: 84. Respondents offer to prove by the witness Habstritt, duly sworn and on the stand ready to
109 testify, that from 1905 to 1910 he was a resident of the Village of Baudette in Lake of the Woods County, Minnesota. That since 1910 he has been a resident of Roseau in the County of Roseau, Minnesota. That for the past 15 years he has been engaged in the real estate business. That he is thoroughly acquainted with the transfers of real property made in Roseau County during said time.

Mr. Lewis: 85. Respondents further offer to prove by said witness that he has never known or heard of a sale or transfer of a flowage easement on any of the lands in Lake of the Woods or Roseau County.

Mr. Harries: 85. Objected to as immaterial; damage in condemnation proceedings are determined by taking the difference in value of the entire tract affected by an easement before and after the taking; and the absence of conveyance of easements as such, does not disprove a market on which damages in condemnation shall be based; besides, the record conclusively shows by certified copies of recorded instruments of conveyance of flowage rights, that transfers did, in fact, occur.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: Respondents further offer to prove by said witness that he personally knows of and had personal connection with the sale and transfer of a number of tracts of land in Roseau County wherein the purchase was made solely because of the value and reputed value of the land in question for flowage and storage purposes on Lake of the Woods and wherein the seller of said land sold same because he was in financial distress and forced so to do.

Mr. Harries: 86. To which the government objects on the ground that the evidence is immaterial; that the
110 witness has not shown himself competent to testify as to motive save by hearsay; and that the allegation that the sale was forced is not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 87. Respondents further offer to prove by said witness that ever since 1905 it has been a matter of common report, reputation and conversation among the people generally residing in Lake of the Woods and Roseau Counties that the lands in the vicinity of the Lake of the Woods which were being flooded by the storage of water in the Lake of the Woods was of high value for flowage and storage purposes, and that it was a matter of common report, reputation, and conversation among said people that said lands so flooded were more valuable for flowage and storage purposes than for any other use or purpose.

Mr. Harries: 87. The Government objects to the foregoing testimony of a higher "use value" on the ground that it is immaterial since as a matter of law the possibility of use for flowage could not be reflected in market values because of the impossibility of making such use of the lands by any means other than the means now invoked, i. e. by international treaty and eminent domain.

The Government also objects to all of the proposed testimony of H. C. Habstritt and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Harries: May the record also show, Your Honor, that the Government objects to the offers to prove on the
111 part of respondents, as to each item thereof, upon the grounds that were stated at length to the Court at the opening of court on Tuesday morning, January 27th last, see [marginal] page 36, line 1, to [marginal] page 43, line 3, herein.

The Court: Yes, the record may so show.

Mr. Harries: And, if the Court please, counsel for Canada has asked me to request leave of the Court to file, as a part of the objections to the receipt of this testimony, the brief which was handed to the Court at the times in question of reservoir values was first raised, and he asks that that appear in the record, probably at this point.

The Court: Well, the record may so show, then,—he wants the record to show that objections were made to the admission of this evidence, for the reasons stated in his brief?

Mr. Harries: Yes, Your Honor.

Mr. Lewis: And may I ask the record show, Your Honor, that in each of these offers to prove, which respondents have made, that each fact recited in the typewritten form, or the offer to prove, which is reduced for convenience to typewriting,—that each fact is offered separately in connection with each one of the offers?

The Court: Yes, that will be the understanding.

The Court: Now, it is my understanding that the Government makes no point of the fact that each one of these witnesses was not called to the stand and sworn before the offer of proof was made?

Mr. Harries: No, Your Honor."

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112 That thereafter respondents offered in evidence Exhibit 55, the same being respondents' offer to prove certain facts as set forth in said exhibit by witnesses GEORGE C. NEWTON and GARDNER S. WILLIAMS, said Exhibit 55, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

(Respondents' Exhibit 55 marked for identification by the reporter)

"Mr. Lewis: The respondents further offer to prove by the witnesses Gardner S. Williams and George C. Newton, the facts set forth in Respondents' Exhibit 55, and I will say to the court that if the witnesses Williams and Newton were permitted to testify, that they would testify to the facts as set forth in said Exhibit 55, consisting of about one and one-quarter typewritten pages.

Mr. Harries: The government objects to the testimony proposed in the offer last made, upon the grounds as stated in the typewritten instrument, to be marked by the reporter

as Government's Exhibit 117, and which I now hand to the reporter for the purpose of being marked and put in the record in this case.

(Instrument just referred to marked for identification as Government's Exhibit 117 by the reporter.)

(The respondents offer to prove by Williams and Newton, marked as Respondents' Exhibit 55, and the objection by the government to such offer marked as Government's exhibit 117, are in the words and figures as follows:)

"Respondents' Offer to Prove

Gardner S. Williams and George C. Newton.

Mr. Lewis: Respondents' offer to prove by the wit-
113 nesses Gardner S. Williams and George C. Newton, that flowage rights and easements are the subject of purchase and conveyance in the State of Minnesota as separate and distinct units of property, and that such rights and easements not infrequently are rented as well as sold. That such flowage rights and easements have a recognized rental value, and that said rental is determined and arrived at in a manner similar to the process of negotiation whereby the fair value, or as sometimes stated the fair market value, of such flowage rights and easements is determined, as described in the foregoing offers to prove by said witnesses.

Mr. Harries: The Government objects to this testimony on the ground that it constitutes a conclusion of law; and is immaterial inasmuch as rental values are not the measure of damage in a condemnation proceeding; and as a matter of law could not have been reflected in the market value of the property affected by the easements.

Mr. Lewis: Respondents further offer to prove that said method of arriving at the fair rental value of such flowage rights and easements is the standard custom and practice usually and customarily followed and employed by persons who engage in the rental of said flowage easements. That said witnesses have had experience in the determination of such fair rental value, and are acquainted with the custom and practice by which said fair rental value is customarily agreed upon and determined.

Mr. Harries: The Government objects to this testimony on the ground that custom and practice in determining rental

values of easements are not material and do not go to the measure of damage in this proceeding.

Mr. Lewis: Respondents further offer to prove that what is the fair rental value of any given flowage right
114 or easement must be determined by a consideration of all the factors and conditions affecting each particular tract or case, and that such consideration and the determination of what is the fair rental value based thereon, is a matter of expert opinion arrived at by the exercise of engineering and market and business experience.

Mr. Harries: Objected to as a conclusion of law and as immaterial.

Mr. Lewis: Respondents further offer to prove by said witnesses Williams and Newton that they are acquainted with the lands involved in these proceedings, and with the circumstances and facts which should be taken into consideration in determining the fair rental value of the flowage easement sought to be imposed on said lands.

Mr. Harries: Objected to as a conclusion of law.

Mr. Lewis: That they have given careful study to all said facts and conditions, and that they have formed an opinion based upon their knowledge and experience as to what is the fair rental value of each of said easements.

Mr. Lewis: Respondents further offer to prove by said witness Gardner S. Williams, that the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Elias A. Olson, described in the petition for said easement is $864.00.

Mr. Harries: To this evidence the government objects on the ground that it is immaterial and not a proper measure of damage in this proceeding; and upon the further ground that rental value was not, and as a matter of law could not be reflected in the market value of the tracts affected by the imposition of the easement because the union of properties necessary was not so practicable that the possibility would affect the market value and such union would not have
115 been practicable or have been attempted except by the intervention of eminent domain.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Harry Brewster, described in the petition for said easement is $1064.00.

Mr. Harries: To which the Government objects on the same ground as last above noted.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Randor G. Karlson, described in the petition for said easement is $752.00.

Mr. Lewis: Respondents offer to prove by said witness George C. Newton, that the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Elias A. Olson, described in the petition for said easement is $896.00.

Mr. Harries: To which the government objects on the same ground as stated to the offer contained in paragraph 93.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Harry Brewster, described in the petition for said easement is $1440.00.

Mr. Harries: Same objections as interposed to the offer in paragraph 93.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Randor G. Karlson, described in the petition for said easement is $976.00.

Mr. Harries: Same objections as interposed to the offer of proof made in paragraph 93.

The Government also objects to all of the proposed
116 testimony of Gardner S. Williams and George C. Newton, and to each item thereof, upon each of the grounds stated immediately after the offer to prove previously made by means of the witness Gardner S. Williams and George C. Newton, and Adolph F. Meyer.

The Court: The objections will be sustained.

Mr. Lewis: Exception."

MR. WILLIAM RULIEN was sworn as a witness on behalf of respondents-appellants and testified that for approximately 25 years he has lived in or near the village of Baudette on the shores of the Lake of the Woods, and that he is engaged in the real estate business. That for 6 or 7 years he has been an appraiser for the Minnesota Rural Credit Bureau. That during the years 1914, 1915 and 1916, the International Joint Commission held public hearings at the villages of Warroad and Baudette with reference to the regulation of the level of the water in the Lake of the Woods. That he did not know of any flowage easements having been bought or sold on the shores of the Lake of the Woods other than such as have been sold to the Government.

Respondents offer to prove by said witness Rulien that there has been throughout Roseau and Lake of the Woods Counties, on the shores of the Lake of the Woods, a great deal of public and private discussion and common talk among people generally regarding the flowage easements and their value, to which objection was made by the Government on the ground that it is immaterial, hearsay and incompetent. The objection was sustained and an exception noted.

117 Respondents further offered to prove by said witness Rulien that he had heard a great many people who attended the hearings of the International Joint Commission at Warroad and Baudette, from and since said hearings were held in 1914, 1915 and 1916, discussing the statements which had been made by the members of the International Joint Commission and their advisors, and that the flowage easements here in question, and the value of the lands below contour 1064 were very valuable, to which the Government objected on the ground that the same is hearsay, incompetent, irrelevant and immaterial. That objection was sustained, and exception duly noted.

Respondents further offered to prove by said witness Rulien, that there was at all times, following the hearings held by the International Joint Commission in the Counties above named, a great deal of public discussion and current rumor to the effect that the lands below contour 1064 and the flowage easements here in question, and the flowage rights on said lands, were of much higher value than the lands above contour 1064, to which offer the Government objected on the ground that the same is incompetent, irrelevant and immaterial. Said objection was sustained, and exception duly noted.

The witness Rulien testified that in 1916 he bought 160 acres of land below contour 1064, and that it was practically all under water when he bought it; that he bought it because of its value for reservoir purposes; that he paid more for it because it was so useful and available for reservoir purposes than he would have paid for it if it had not been useful and available for that purpose; and that he would not have purchased it at all except for the fact that it was useful and available for reservoir purposes.

Later in the course of the trial, the court being
118 of the opinion that respondents might not recover any value which their land possessed because it formed a part of the storage reservoir, struck all of Mr. Rulien's evidence, on motion of the government. Respondents duly excepted.

William Rulien, a witness called on behalf of respondents, being first duly sworn testified as follows:

Cross-Examination.

By Mr. Harries:

Q. Did you testify at the last trial, Mr. Rulien, that you had been engaged in buying and selling land along the south shore of the lake for many years?

A. Yes, I think I did.

Q. And you knew all about the sales, or practically all, that were made at the Lake of the Woods, of all such lands?

A. I know a great number of them.

Q. You so testified before, did you not?

A. Yes, I think so.

Q. That you had known of the majority of them?

A. Yes, sir.

Q. Is that so? A. Yes, sir.

Q. And that you had made the majority of them yourself, isn't that true? A. Possibly.

Q. Did you testify on the last trial that in making the sale of land that you had made, nobody on either side of the transaction had even taken into consideration the power or the reservoir value in connection with these lands?

A. In making any sales,—not in any sales that I made.

Q. Sir?

A. I never represented any reservoir values in any sales that I made.

* * * * * *

Q. So that we may understand each other: Any sales with which you had contact, or with which you were involved,

or any which you had heard of, having to do with sales in Roseau and Lake of the Woods, whether on the shore of the Lake of the Woods or elsewhere, in none of these has this element of reservoir value entered in the transaction, is that correct?

A. As I understand the question was, if I had heard of any sales, or if I had made any sales myself?

Q. Yes.

A. Or where that element was discussed?

Q. Yes. A. In making the sales?

119 Q. Yes. A. I have not.

Q. You have not heard of any since, have you?

A. Yes, the Government buying the easement.

Q. None outside of that? A. No.

* * * * * * *

Q. And I take it that you probably know more about the selling price of land in your region than anybody else at least, as much? A. Yes, I think so.

Q. You are familiar with the market value, both of lands in Roseau and Lake of the Woods Counties, on the shore and elsewhere, is that true? A. Yes, sir.

Q. Did you testify at the last trial that you did not know of anyone who had sold any land where the element of the reservoir value had entered into the transaction?

A. I believe I did.

Q. Is that a fact? A. Yes, sir.

Q. It was not taken into consideration by any purchaser, or by any seller of land along the lakeshore, that you know of?

A. Not in any sales that I was connected with.

Q. And you were connected with a substantial number of them? A. Yes, sir.

Redirect Examination.

By Mr. Lewis:

Q. Now, did I understand you right when you said that any lands which you sold were above 1064?

A. Yes, sir.

Q. Then let me ask you what you referred to, in the question which counsel read to you from the record of your testimony heretofore, that the element of the value of these lands for reservoir purposes had not been taken into consideration in connection with what lands you were testifying to, lands above 1064 or below 1064?

A. Lands above 1064.

Q. And have you ever understood that the lands above 1064 have had any value for reservoir purposes?

A. No, I have not.

Q. And so far as you know, it has never been taken into consideration in connection with any land above 1064?

A. No.

120 Q. Do you recall that in 1921 you were grantee to a tract of land in which he (Zippel) was named as grantor?

A. Yes, I did.

Q. Do you know whether it is under 1064, or below 1064?

A. I don't know, no.

Q. You don't know anything about that?

A. I don't know a thing about it.

Q. Are there any other pieces of land that you have transferred, or with the transfer of which you have had some connection, the elevation of which you would not know?

A. Yes. I have not made it a point to look up the elevation of the lands that I was selling.

(The following questions and answers appear in the reporters' transcript immediately after the foregoing, and are included in this record by consent of Government's counsel:)

Q. I see. You were not concerned with that element particularly in connection with those Tracts?

A. I was not trying to sell land that I thought would be covered by water. I could not very well represent it as a farm proposition. There is lots of other land to sell.

Q. So that you did not go into that question at all?

A. I did not try to sell reservoir land.

Q. Well, you did not go into the question then on that account, for that reason? A. No.

121 The Court: If there is any other evidence that you think the Court should have outside the testimony which this witness which you are putting on will testify to, I presume these witnesses are going to testify to their having made purchases of land below 1064 with the idea that they had a greater value than other lands up there on account of their use for reservoir purposes, of course I could receive that."

Mr. Lewis: This suggestion occurs to me in that connection; we are all interested in shortening the time and if anything develops in the argument where a question of fact becomes material, upon which there is no evidence, counsel can state to the court what the fact would be on that, and in that way probably shorten the time a great deal.

The Court: That was what I was thinking. I think we can take care of the whole thing by discussing it at this time.

Of course there is no object in the jury remaining here to listen to the arguments of counsel; in fact I might state to the jury that I do not know how well you grasp the situation, but the question which I am going to be called upon to decide as a question of law is whether we shall listen to all the evidence relative to the use which could be made of the waters of the Lake of the Woods in developing power, and the value of the power interests on the Winnipeg River, and as to what bearing that has on the question of the value of the lands, or whether as a matter of law that should be excluded and we confine ourselves simply to the market value of the lands for other purposes. Of course that is a big question in the case and they want to present it to me first as a question of law, and according as to how that is decided will depend the length of this trial and the amount of evidence which will have to be received, and I think we have reached a point now where I probably have sufficient information so that I can pass, either one way or the other, upon that question. It is not a matter which concerns you at the present time. It is simply a question of law; so you can be excused until 2 o'clock this afternoon, and just leave the court room if you will please, and be back here at that time.

(Jury leaves court room)

Statement by Mr. Lewis pages 32 and 33 and the first 6 lines of 34 herein. Jury returns.

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122 Thereupon respondent HARRY BREWSTER was sworn as a witness on behalf of respondents. Respondents offered to prove by said witness Brewster that in the year 1922 he purchased 160 acres of land because it had a value, and was reputed to have a value, for storage and reservoir purposes, and that he paid a higher price for said tract of land because of the fact that it had, or was reputed to have, a higher value for flowage and reservoir purposes; and that he would not have purchased said tract at all, except for the fact that it had, or was reputed to have, a higher value for flowage and storage purposes,—to which offer the government objected on the ground that the motive for such acquisition was immaterial and the testimony offered was incompetent, irrelevant and immaterial. Government counsel stated that there was no objection to testimony on the part of the witness as to the price he paid for the lands involved in this proceeding. The objection was sustained and an exception duly noted.

Respondents further offered to prove by said witness Brewster that the reasonable and fair value, and the fair market price of the easement which the government seeks to impose upon his land in these proceedings is $60,000,—to which the Government objected on the grounds last above stated. Said objection was sustained and exception duly noted.

Thereafter the witness Brewster testified as follows:

By Mr. Lewis:

"Q. Mr. Brewster, will you state what would be the fair market value of your 220 acres which you say are below contour 1064, and upon which the Government is seeking to impose a flowage easement, before that easement is im-
123 posed upon it, that is, when you have and own the full flowage rights on these lands?

A. $300.00 an acre."

* * * * * *

"Q. All right. Now what is the fair market value of these lands below contour 1064 with the easement imposed upon it?

A. Nothing. It is valueless."

* * * * * *

Cross-Examination.

By Mr. Harries:

"Q. And in telling us the valuation that you put on your land per acre, what basis did you have for the figures that you named? A. For power purposes.

Q. Were those the only purpose you had in mind?

A. Yes, sir.

Mr. Harries: The Government moves that the testimony of Mr. Brewster relative to the valuation of this land be stricken."

The Government's said motion was granted, and respondents duly excepted.

Mr. Harries: The Government has no objection to testimony on the part of this witness as to the price he paid for the lands involved in this proceeding, but objects to any testimony as to the motive he may have had in acquiring the same, on the ground that it is incompetent, irrelevant and immaterial.

Respondent ELIAS A. OLSON, was next duly sworn as a witness on behalf of respondents, and after stating that he was born in Sweden, and had been in the service of a company engaged in dam construction, the following proceedings were had:

"Q. Just very briefly tell the Court and the Jury what connection you had with water power over in the old country?
A. I used to work on the dam construction."

* * * * * *

Q. And did you learn when you were over there in the old country anything about whether the lands that were covered with water, and had formed a part of the reservoir, were more valuable or less valuable on that account, than were the other lands?
A. More or less valuable, yes.
Q. What was it, more valuable or less valuable?

124 Mr. Harries: Just a moment. We object to that on the ground that it is immaterial.

The Court: The objection is sustained.

Mr. Lewis: We offer to prove by the witness and respondent Olson, now on the stand, that through his employment in Norway in connection with the construction of water-power dams, and his connection with water power projects, that he learned that the lands used for flowage and storage purposes were more valuable on that account than were other lands; which offer was objected to as immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

* * * * * *

Q. Did you know about the power plants that were built, and that they were operating down in the Winnipeg River?

Mr. Harries: We object to that inquiry on the ground that it is utterly immaterial, and on the further ground that the Court has already ruled on the question of the admissibility of this testimony.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: We offer to prove by this witness and respondent Olson, that before filing for the homestead which

he later acquired, he had been in the city of Kenora in the Dominion of Canada, where some of the dams here in question, and which obstruct the outlet of the Lake of the Woods, had been constructed, and that he was acquainted with the fact that extensive and valuable hydro-electric power plants had been built, and were in operation in the Winnipeg River.

Mr. Harries: To which we object on the ground that the offer of that testimony is incompetent, irrelevant and immaterial, and without proper foundation.

The Court: The objection is sustained.

Mr. Lewis: Exception.

125 By Mr. Lewis:

Q. Will you state, Mr. Olson, what was your intention and your purpose in filing on the particular piece of land which you did file on, and which you later acquired as your homestead?

Mr. Harries: That is objected to as immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: Respondents offer to prove by the witness and respondent Olson that his intention and purpose in filing on the tract of land which he later acquired as a homestead was because of the fact that said lands possessed and were reputed to possess high value for flowage and storage purposes.

Mr. Harries: To which the government objects on the ground that the motive of acquisition is immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

* * * * * *

Q. Will you state to the Court and Jury what is the fair value and the fair market value of that flowage easement?

Mr. Harries: Just a moment. That is objected [as] as incompetent, irrelevant and immaterial, not a proper measure of damage.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: The respondent Olson being the owner of the flowage right and easement sought to be acquired by the Government, offers to prove by his own testimony that the reasonable value and market price of said easement is $16,000.00.

Mr. Harries: To which the Government objects upon the ground that no proper foundation has been laid, and
126 upon the further ground that the proposed testimony would not be based upon the proper measure of damage in the proceedings in this court:

The Court: The objection is sustained.

Mr. Lewis: Exception.

* * * * * *

Q. For all purposes, I said; what is the value of the 56 acres of land for all purposes? A. Including storage?
Q. And everything else?
A. About $300.00 an acre.
Q. $300.00 an acre? A. Yes, sir.
Q. And what is the value of that same tract of land below contour 1064, after the flowage easement is imposed upon it?
A. No value. It will be of no value.
Q. No value? A. No value."

Elias A. Olson, a witness called on behalf of respondents, being first duly sworn, testified as follows:

Q. For all purposes, I said; what is the value of the 56 acres of land for all purposes?
A. Including storage?
Q. And everything else?
A. About $300.00 an acre.
Q. $300.00 an acre? A. Yes, sir.
Q. And what is the value of that same tract of land below contour 1064, after the flowage easement is imposed upon it? A. It will be of no value.
Q. No value? A. No value.

* * * * * *

Q. Part of your land there is below contour 1064?
A. Yes.
Q. How did you locate that contour, Mr. Olson?

A. I did not locate it.
Q. Who did? A. I suppose the engineers did.
Q. Well, you don't know where that contour line runs on your land then, I take it. A. No.
Q. And you think your land, below that line, is worth $300.00 an acre, you said? A. Yes, I do.
Q. How did you figure that out?
A. On account of that the land would be suitable for water storage.
Q. For water storage? A. Yes.
Q. What do you mean by water storage?
A. To store the water for use for electric power.

Mr. Harries: The Government moves that the testimony of this witness relative to the value of lands below contour 1064 be stricken on the ground that it is based upon an incompetent and immaterial element of damage.

* * * * * * *

The Court: The evidence may be stricken.

Mr. Lewis: Exception.

Mr. Harries: The Government moves that the testimony of this witness relative to the value of lands below contour 1064 be stricken on the ground that it is based upon an incompetent and immaterial element of damage.

Mr. Lewis: That is objected to, if the Court please, for the reason that as we understand the rule of law, the owner of land is entitled to show and to prove all uses to which his lands are reasonably adaptable.

The Court: The evidence may be stricken.

Mr. Lewis: Exception."

Thereafter respondent RANDOR G. KARLSON was sworn as a witness on behalf of respondents, and stated that he was one of the respondents and the owner of 160 acres, practically all of which was below contour 1064, and upon which the government sought to impose a flowage easement. That he purchased said tract in 1921. Whereupon the following proceedings were had:

127 "Q. I see, and you know that that condition existed (flooding of this land) as far back as 1915? A. Yes.

Q. Well then let me ask you again if I may, to complete the record, why, under those circumstances did you buy that 120 acres that you say you bought in 1921?

Mr. Harries: Objected to as immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception. The respondent offers to prove that the reason why he bought the 120 acres here in question in 1921 under the circumstances just disclosed by the evidence is because the said 120 acres was valuable and was reputed to be valuable for storage and flowage purposes.

Mr. Harries: To which the government objects on the ground that the motive of purchase is immaterial.

Mr. Lewis: Respondent further offers to prove that he paid a higher value for said 120 acre tract purchased in 1921 because of the fact that it possessed a higher value for storage and flowage purposes, than he otherwise would have paid, except for the fact that it possessed such higher value.

Mr. Harries: To which the Government objects on the ground that the action of the respondent in paying more or less for his property at a given time has no bearing on the question of its value at the time of the award of the Commissioners in these proceedings.

Mr. Lewis: Respondent further offers to prove that at the time he purchased said 120 acre tract he purchased the same on a forced sale; that the grantor who sold and conveyed said 120 acre tract to him was in financial distress and unable to meet his obligations, and that he conveyed and sold said tract to him under those circumstances and for those reasons.

128 Mr. Harries: Objected to as immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception.

Q. Mr. Karlson, what is the fair value, and the fair market value of the flowage easement which the Government is seeking to impose upon your tract of land below contour 1064, which land is involved in these proceedings?

Mr. Harries: Objected to as incompetent, irrelevant and immaterial, and not the true measure of damage.

The Court: Objection sustained.

Mr. Lewis: Exception. The respondent offers to prove that the fair value of the flowage easement on the tract of land involved in these proceedings below contour 1064 is $44,000.00.

Mr. Harries: To which we object on the ground that the value of the flowage easement is not the true value, or not the true measure of the damage sustained by the respondent in these proceedings.

The Court: Objection sustained.

Mr. Lewis: Exception.

Q. When you went up into the country did you hear any common report or talk among the property owners up there, and the people up there generally, with reference to the value of lands below contour 1064? A. Yes.

Q. What was that common report and talk that was heard with reference to the value of these lands and the reasons for their being valuable or for their not being valuable?

Mr. Harries: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception. One more question.

129 Q. Mr. Karlson, did that common report and talk and conversation about the value of these lands continue from the time that you went up there, clear down to the present time? A. Yes.

Q. And has that common talk and report that has been abroad in that neighborhood with reference to the value of these lands been substantially the same all the time from the time you went up there in 1904, down to the present time?

A. Practically, yes.

Mr. Lewis: Respondent offers to prove that when he went to the Lake of the Woods country in 1904 he found a great deal of conversation, common report and reputation abroad, among the property owners, and among the public generally in that community to the effect that the lands below contour 1064 were very valuable for storage and flowage purposes, that the power companies were using said lands below contour 1064 for storage and flowage purposes and that said lands were more valuable for that purpose than they were

for any other use and purpose; that the value of said lands for use as storage and for reservoir purposes existed at that time and that the Canadian companies which had so used said lands were then owing to the owners of said property, substantial sums of money on account of said use of their lands.

Mr. Harries: To all of which the Government objects on the ground that the inquiry is incompetent, irrelevant and immaterial, and not the proper measure of damage in this proceeding.

The Court: Objection sustained.

Mr. Lewis: Exception.

* * * * * *

Q. Do you know what is the most valuable use and purpose to which these lands may be devoted? A. Yes.

Q. What is their most valuable use?

A. For reservoir and storage purposes.

130 Q. Do you know now what is the reasonable market value of the use of your lands for storage purposes and flowage purposes?

Mr. Harries: Objected to on the ground that he is not competent to testify on that subject.

The Court: Objection sustained.

Mr. Lewis: Exception.

Q. You may state, Mr. Karlson, whether the value to which you testified a moment ago, is the value that is placed upon those lands generally by the people in that community who are acquainted with the lands, and were acquainted with the value and use of those lands?

Mr. Harries: Just a moment—objected to as without proper foundation, and hearsay and incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception."

That previously respondent and witness Karlson testified that the fair market value of his land involved in these proceedings before the government imposed the flowage easement upon it was $275.00 per acre, and that said land after the imposition of said easement upon it, was worthless.

That the court, on motion of the government, struck said testimony from the record, and that respondent duly excepted thereto.

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131 RANDOR G. KARLSON, a witness on behalf of respondents, being first duly sworn, testified as follows:

Q. You say, Mr. Karlson, that you think that land is worth $275.00 an acre? A. Yes.

Q. How do you arrive at that figure, Mr. Karlson?

A. We have employed engineers and also have had an organization formed in order to keep in contact with the valuations.

Q. And you were going by the advice of those people you employed? A. Yes.

Q. You do not profess to know anything yourself about what the value of that land is, do you?

A. Absolutely not.

Mr. Harries: We move that the testimony of the witness as to the value of the property in question be stricken.

The Court: It may be stricken.

Mr. Harries: That is all.

By Mr. Lewis:

Q. Mr. Karlson, when you say that you have no opinion of your own as to the value of the lands, just what do you mean?

A. Only that I am not in shape to figure out the value of a proposition of that sort. All I can go by is what our counsel and the engineers have to say—the advice given.

* * * * * * *

Q. Now the three forties which are in.....the southwest corner of your tract, you acquired from Alfred Green? A. Yes.

Q. When did you buy that land from him, in 1921?

A. 1921, yes.

Q. And what did you pay Mr. Green for it?

Mr. Lewis: Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

The Court: Objection overruled.

Mr. Lewis: Exception.

Mr. Harries: You may go ahead and answer that.

A. I think it was $175.00.

Q. For the three forties? A. Yes.
Q. $175.00? A. Yes.

Mr. Harries: That is all.

132 Redirect Examination.

(Added at the request of Respondent-Appellant's Counsel)

By Mr. Lewis:

Q. Mr. Karlson is this man that counsel has been inquiring about, Mr. Green, any relation of yours?
A. Yes.
Q. What is the relationship between you and him?
A. He is my brother-in-law.
Q. You may state whether your brother-in-law was owing you money, and had been for some time, before you took over this land from him? A. Yes, he had.
Q. Where was your brother-in-law at the time and shortly before the time that this conveyance was made to you?
A. He was working in North Dakota, on a farm.
Q. Had he been spending any time at home and attending to affairs at home at that time?
A. Not at that time.
Q. Did he have any means of paying you back the money that he owed you, except by conveying this land to you?
A. Not at that time.
Q. As I understand you then, he simply turned over the land to you in payment of his debts? A. Yes.
Q. And went back to North Dakota?
A. Yes.
Q. Now, some time after that, after the boy became somewhat older, do you know whether he himself bought any of this low land below contour 1064?
A. Yes, he did.
Q. And is the tract he bought substantially all below 1064?
A. I can't say as to that. A big share of it, I think, is below.
Q. And has he been living on that land or doing anything with it?
A. No, he has not.

133 Respondents next offered in evidence Respondents' Exhibit 5, which was an executor's deed in the usual form by R. M. Skinner, Executor, to W. E. McGuire, dated February 21, 1930, the portion of which is material here.

"Reserving however, to the estate of Alonzo Wheeler, all claims which it now has against the United States of America, as a result of condemnation proceedings commenced by said Government in obtaining certain grants of easement to lands bordering on Lake of the Woods, in Minnesota.

Respondents next offered in evidence Respondents' Exhibit 6, said exhibit being a warranty deed in the usual form, by Anna McCagherty, a widow, to Lenus Landby, dated May 26, 1924, the portion of which here being material:

"It is hereby agreed and understood by and between the parties hereto that said party of the first part reserves to herself and her heirs and assigns, an undivided one-half interest in and to any and all damages to said land that have or may have accrued, or may be assessed on account of the high water of the Lake of the Woods, and which matter of damages has been under the consideration of an International Joint Commission of the United States and Dominion of Canada."

Respondents next offered in evidence Respondents' Exhibit 7, said exhibit being a warranty deed in the usual form, by Frank Decker, to Albertina Franson, dated August 27th, 1928, the portion of which here material being:

"Reserving flowage easements as provided by the treaty between United States and Great Britain, Feb. 24, 1925."

Respondents next offered in evidence Respondents' Exhibit 8, said exhibit being a quit claim deed in the usual form, by Russell J. Kidder to John F. Kidder, dated Nov. 19, 1930, the portion of which here material being:

"The Grantor herein reserves to himself, his heirs, executors, administrators and assigns all claims for past damages due to artificial obstruction in the outlets of Lake of the Woods, also all claims for damages arising by virtue of the flowage easement that the United States is seeking to acquire, by reason of the raising of the level of the Lake of the Woods, and affecting said land."

Respondents next offered in evidence Respondents' Exhibit 9, said exhibit being a warranty deed in the usual form,

by Ole S. Swanson to Emma Smith, dated January 2, 1926, the portion of which here material being:

134 "Said parties of the first part retain to themselves, their heirs and assigns, all rights and claims for damages which may be paid by the United States Government and the Dominion of Canada on account of high water on Lake of the Woods, arising prior to September 28th, 1920."

Respondents next offered in evidence Respondents' Exhibit 10, said exhibit being a warranty deed in the usual form, by Wm. H. Ringling to Ole Meland, dated October 6, 1927, the portion of which here material being:

"Said parties of the first part do hereby expressly reserve to themselves, their heirs and assigns any and all claims for damages that may have heretofore accrued to said land, or that may hereafter accrue, either for flowage easements or otherwise, on account of the fluctuation of the water levels of Lake of the Woods, the regulation of which has been established by a Treaty entered into by the Governments of the Dominion of Canada and the United States and dated on or about February 24, 1925."

Respondents next offered in evidence Respondents' Exhibit 11, said exhibit being a warranty deed in the usual form, by Clair A. Lockrem to L. S. Darbyshire, dated 16th day of March, 1928, the portion of which here material being:

"Excepting and reserving to Clair A. Lockrem, his heirs and assigns, a flowage easement to elevation 1064 sea level datum upon said lands, and any or all awards as may hereinafter be made under the Lake of the Woods Act, approved May 22nd, 1925, for flowage easement to elevation 1064, or for such flowage easement as may be acquired under any amendatory act."

Mr. Harries: If the Court please, the Government objects to the admission of Respondents' Exhibit 7 and 11, on the ground that the same are incompetent, irrelevant and immaterial, and that no proper foundation has been laid therefor. I might call to the attention of the Court the fact that these instruments both purport to have been executed in 1928, after the effective date of the treaty under which the lands were overflowed. And any rights which were reserved

by the parties in opposition to the rights of the Government under that treaty, would, of course, be void.
135 And as to Respondents' Exhibit 6, the Government objects upon the same grounds as interposed to Exhibit 7 and 11, and upon the further ground that the matters therein referred to are damages sustained in the past, and have nothing to do with the flowage easement involved in this proceeding.

The Court: The objection will be sustained.

Mr. Lewis: Exception.

* * * * * *

Mr. Harries: If the Court please, the Government objects to the reception of Respondents' Exhibit 5, on the ground that it is incompetent, irrelevant and immaterial, and without proper foundation, and not within the issues before the court.

Respondents' Exhibit 8 is objected to on the same grounds, and on the further ground that the instrument executed November 21, 1930,—or I mean the instrument acknowledged on November 19, 1930, refers to claims for damages which the owner, or the grantor of that property, may have sustained.

Respondents' Exhibit 10 is objected to upon the same grounds as Exhibit 5 and 8, the last two exhibits, and on the further ground that the reservation therein referred to has to do with damages sustained in the past, and not with the easement itself, with which we are here concerned.

Respondents' Exhibit 9 is objected to on the same grounds as before, and on the further ground that it relates to claims for damages arising prior to September 28, 1920, with which we are not here concerned.

The Court: Well, what is it that you claim, Mr. Lewis, for this executor's deed? I think the objection to all the others will be sustained, but I do not exactly understand
136 what the purpose of this exhibit is. Does that make any reservation?

Mr. Lewis: I think they do, your Honor.

The Court: I did not look at it carefully enough.

Mr. Lewis: It may be that I have gotten an instrument into the files that does not, but I thought it made reservations.

The Court: Perhaps that is only the description of the property.

Mr. Lewis: Yes.

The Court: Then I will sustain the objection.

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137 Respondents thereupon offered in evidence Respondents' Exhibit 1, the same being application of St. John River Power Company to the International Joint Commission, and the order of the commission thereon, the material portions of said application and order being as follows:

"Application

To the Honorable the International Joint Commission:

Application made by Saint John River Power Company (Hereinafter called the Applicant) for permission to construct and operate certain permanent works in and adjacent to the channel of the River Saint John in the Province of New Brunswick at a point on or near the said River known as Grand Falls; respectfully showeth:

1. Status of the Applicant

The applicant is a corporation duly incorporated by special Act entitled "An Act to Incorporate Saint John River Power Company" passed by the legislative Assembly of the Province of New Brunswick during the session held in the present year, a copy of which, with the exception of Schedules, A, B, C, and D thereto, is set forth as Appendix I hereto.

* * * * * *

5. The Company may generate, purchase or otherwise acquire, sell, transmit and distribute electrical power and energy, and specifically, but without limiting the generality of the foregoing, the Company shall have full right and authority to develop hydro-electric power on the Saint John River at or near Grand Falls and for that purpose to divert and regulate the flow of said river and its tributaries both above and below its works, to such an extent and in such manner as it shall deem necessary, and also full right and authority to develop water storage and regulation thereof

138 in New Brunswick and beyond its borders and in interprovincial and international boundary rivers and streams, and to construct, maintain and operate transmission and distribution systems for such power any-

where in New Brunswick and points beyond its borders; provided, however, that the Company shall not export electrical power or energy beyond the limits of Canada except to the extent necessary to comply with any order of the International Joint Commission appointed pursuant to the Treaty between the United States of America and Great Britain dated the 11th day of January, 1909, unless and only to the extent that such export shall be approved by the Lieutenant-Governor-in-Council."

* * * * * * *

3. General Description of Project.

The applicant proposes to develop the natural water power at Grand Falls for the production of hydro-electric power.

The power development project, as now conceived and planned, will involve the construction of storage dams at various points within the tributary basin and the ultimate capacity of the development is contingent upon the ultimate extent to which the dependable flow of the Saint John River above Grand Falls may in the future be progressively increased, through the agency of artificial storage.

The power site of Grand Falls lies wholly within the Province of New Brunswick, about three miles below the point at which the line of the international boundary intersects the medial thread of the River Saint John, and all the works and structures incidental to the initial phases of the projects are in Canadian territory.

5. Effect of Proposed Works on International Waters.

The effect of the proposed works on international waters will be identically the same as the effect of the proposed works of the New Brunswick Electric Power Com-
139 pany would have been and is as follows:

By means of the main dam above described it is proposed to hold the upstream pondage at an operating level corresponding to high water marks at Grand Falls, but at no time above such elevation.

During the freshet period, the river will rise to high water stage through the ordinary natural process as heretofore, but during the low water period the effect of the dam at Grand Falls will be to still maintain the high water stage in the immediate vicinity of the dam, and pond the water back for about thirty-two miles at an elevation somewhat above low water mark, but at the same time always below high

water mark. The condition described is plainly indicated in the profile sheet, Plan No. III, submitted herewith.

* * * * * *

It will be seen that at the point where the ponded flow meets the international boundary, it is about sixteen feet above the natural minimum, and about four feet below the natural maximum water level. This relationship is seen to become gradually modified as the pondage extends upstream, until at Van Buren, Maine, the ponded level is only twelve feet above low water mark, and about fourteen feet below the natural maximum water level and finally reaches a point near St. Basil, New Brunswick, where the two levels coincide.

It is therefore evident that the only land adversely affected at any point within the ponded reach is the riparian strip between low and high water mark. The total area actually submerged at low stages of the river is eight hundred acres of which four hundred acres are in Canada and four hundred acres are in the State of Maine. This area includes, in addition to arable lands, a considerable acreage of sand and gravel bars exposed at periods of low discharge. The extent to which arable lands below high water mark are affected is more clearly shown on Plants No. IV to X inclusive, these being large scale plants covering successive portions of the ponded reach and upon which are shown the contours on both banks of the river, and a flow line in red showing the relative positions of the present permanent shore lines and the new shore lines which will result from the creation of the proposed pondage.

The Applicant is fully aware of the fact that the above described use of international waters is subject to a prior right in respect of navigation and other uses, and in connection with the same it is submitted that the proposed raising of the level in the ponded reach, together with the general improvement in flow regulation, through the agency of artificial storage, will jointly effect a more efficient dilution of sewage wastes, provide a purer and more abundant water supply at all stages of flow, and improve navigation not only in respect to ferries and other small craft on the ponded reach, but on all sections of the St. John River below the confluence of tributaries wherein storage dams may be located.

The progressive development of artificial storage will likewise in corresponding degree reduce flood damage and promote the interests of log driving by extending the season, improving the difficult reaches, and providing greatly improved facilities for booming and sorting.

Inasmuch as the project in question involves the placing of an obstruction in waters below the international boundary which will affect the level of waters above the boundary, and the flowing across the same, it is the opinion of the Applicant that your Honorable Commission may have jurisdiction in the premises, under the terms of Article IV of the Boundary Waters Treaty.

This Application is therefore respectfully submitted
141 for your consideration.

Petition. The applicant does now pray for such order, ruling or decision, authorizing and empowering the Applicant to proceed with the said works as may in the opinion of your Honorable Commission be required by the "Waterways Treaty Act" together with such provisos as may be deemed fitting in the premises.

All of which is respectfully submitted.

BROWN, MONTGOMERY &
McMICHAEL,
DAVIS, POLK, WARDELL,
GARDINER & REED,
Solicitors for Saint John River Power Co."

"Order.

Whereas the Saint John River Power Company (hereinafter called "The Applicant") has presented to and filed with this Commission plans of certain permanent works (hereinafter referred to as "the said works") for the development of hydro-electric power in and adjacent to the channel of the River St. John in the province of New Brunswick at a point in the said river known as Grand Falls and has applied for approval of the said works and authority to proceed with the construction of the same under the provisions of the Treaty between the United States and Great Britain relating to boundary waters and questions arising between the United States and Canada on the 11th day of January, 1909; and

Whereas, the power site of Grand Falls shown on said plans and described in said application lies wholly within the said Province of New Brunswick about three miles below the point at which the line of the international boundary intersects the medial thread of the River St. John, and it is proposed to create and maintain a ponded area in the said river for a distance of approximately thirty-two miles above

said Grand Falls, approximately twenty-nine miles of which ponded area is in that part of the river along which the international boundary between the United States and
142 the Dominion of Canada passes; and

Whereas, the present Application came on for hearing at the City of Washington in the District of Columbia on the 28th day of June, 1926, after due notice to all parties interested in both countries of the filing of said Application and of the time and place of said hearing; when evidence was adduced and counsel heard on behalf of all parties; and

Whereas, the Applicant has entered into an agreement with Madawaska Company (the successor in interest to St. John Lumber Company) covering the same subject matter as was covered in the agreement between the New Brunswick Electric Power Commission and St. John Lumber Company attached as Schedule A to the above mentioned order of this Commission dated the 22nd day of June, 1925, and a copy of said agreement has been communicated to this Commission, and contains provisions involving possible future references to this Commission; and

Whereas, the Applicant has entered into an agreement with Bangor and Aroostook Railroad Company and Van Buren Bridge Company covering the same subject matter as was covered in the agreement between the New Brunswick Electric Power Commission and said Companies attached as Schedule B to said order of this Commission and a copy of said agreement has been communicated to this Commission and contains provisions involving possible future reference to this Commission; and

Whereas, the Application has not yet effected a settlement with certain other owners of property which it is alleged will be taken or injuriously affected by said works, but has intimated that it expects and intends to do so; and

Whereas, conditional on this Order being granted, the agreement between Grand Falls Company, Limited, and the International Paper Company and the New Brunswick Electric Power Company, Commission attached as Schedule C to said Order of this Commission has been cancelled by
143 the parties thereto; and

Whereas, at the hearing on the above mentioned Application by the New Brunswick Electric Power Commission counsel for the United States claimed that the United States

is entitled to a certain percentage of the power to be developed at Grand Falls as aforesaid, and The Dominion of Canada and the Province of New Brunswick denied this right; and

* * * * * *

Whereas, the members of this Commission after having read the letters addressed to its Chairman from the Premier of New Brunswick and the Chairman of the New Brunswick Electric Power Commission and from the Grand Falls Company, Limited, and International Paper Company referred to in the Application in this matter, and also letters to the Chairmen of this Commission from the Attorney General of the State of Maine, from the Bangor and Aroostook Railroad Company, and Van Buren Bridge Company, from Madawaska Company, from the Canadian National Railways and from the Canadian Pacific Railway, and after having thus read the agreements above referred to, and after having heard the evidence adduced and counsel for the Applicant, the United States, the Bangor & Aroostook Railroad and Van Buren Bridge Company, the Canadian National Railways and the Canadian Pacific Railway, and after having considered the matters above recited, have determined that the said works should be approved and authority given for the construction thereof pursuant to said Treaty subject to the conditions hereinafter set forth.

1. This Commission Therefore Orders and Directs That the said plans be and the same are hereby approved, and the construction and operation of works in accordance therewith authorized under the provisions of said Treaty, upon and subject to the following conditions:

(1) That this Commission reserves to itself the right
144 to take jurisdiction in the instances mentioned in the above mentioned agreements of the Applicant with Bangor and Aroostook Railroad Company, and Van Buren Bridge Company, and with Madawaka Company.

(2) That the said Applicant make suitable and adequate provision, to the satisfaction of this Commission, for the protection and indemnity against injury of all other interests on either side of the boundary.

(3) That the said works shall have such discharge capacity and be so constructed as to permit the passage of water

at all flood stages in no less quantity than would pass down under natural conditions in the international section of the river, and whenever the flow of the river exceeds the discharge through the power house to such an extent as to cause the ponded level of the water surface immediately above the dam to rise above elevation 427.26 (mean sea level datum) being the operating level shown on sheet number 3 of said plans—the sluices and other works for the passage of water shall be so operated as to provide for the passage of the river flow until the water level at the dam falls to said elevation.

2. And This Commission Doth Hereby Reserve to the Applicant and to all parties having claims for injuries in respect of said works other than the parties to said agreement the right to apply for such further order, direction or action with reference to such claims as may deem proper.

3. And This Commission Also Orders and Directs, in accordance with Applicant's suggestion in that respect set out in Section 2 of its Application, that the Applicant execute and deliver to International Paper Company an agreement in substantially the form appearing as Schedule A hereto and covering the supply of 2,000 H. P. of energy for use in the United States, it being understood that this condition is being imposed in order that the position of the United States and of the State of Maine on the one hand, and that
145 of the Dominion of Canada and Province of New Brunswick on the other hand, shall be substantially the same under this Order as under the above mentioned order of this Commission dated the 22nd day of June, 1925. But should the above mentioned 2,000 H. P. cease to be available for use in the United States at any time for any reason this Commission reserves the right of the parties to reopen the question and ask for a decision on the contentions of the United States and the State of Maine, and of the Dominion of Canada and the Province of New Brunswick advanced at the hearings of this Commission on the above mentioned application of the New Brunswick Electric Power Commission, held at Van Buren, Maine, on the 25th day of March, 1925, and at Montreal on the 15th and 16th days of May and the 12th and 13th days of June, 1925. And until this Commission renders a decision on such questions the Applicant shall make available at least 2,000 H. P. for use in the United States upon receiving reasonable notice in writing requiring it so to do unless relieved by order of this Commission from so doing. Liberty is hereby reserved to the Applicant from time to

time and at any time to apply to this Commission for relief from said requirement.

4. And This Commission Doth Further Order and Declare that nothing in this Order contained, in the recitals or elsewhere, shall by implication or otherwise be construed or taken as an expression of opinion on the part of the Commission with reference to the contentions above recited or as a recognition in any way of the principles contended for by counsel for either country at the hearings above mentioned.

Dated at Washington, D. C. this 28th day of June, A. D. 1926.

C. D. CLARK,
C. A. MAGRATH,
FRED T. DUBOIS,
H. A. POWELL,
P. J. McCUMBER,
W. H. HEARST."

146. The Government objected to said offer on the grounds stated in connection with the foregoing offers to prove. The court sustained said objection, and respondents duly excepted.

Respondents next offered in evidence Respondents' Exhibit 32, the same being a volume containing the final arguments before the International Joint Commission the question of regulating the level of the waters of the Lake of the Woods, the material portions of which are as follows:

* * * * * * *

(By Hon. C. J. Rockwood, attorney appearing before the International Joint Commission.)

"The one thing it seems to me that this commission should do is to see that it does not do anything that will tie the hands of the next generation and limit the possibilities of this water power. Every inch of elevation that can be added, if it can be used once a year, equals in the neighborhood of $100,000 in value every inch. The addition of a foot, if it is utilizable, adds in the neighborhood of a million dollars, computing power at $10 per horse power. The value and the possibilities are simply beyond the conception of any of us, and the one thing most of all that should be in the minds of this commission and of everyone who acts with any responsibility toward

this development, is to see that nothing is done and nothing is permitted to be done that will tie the hands of the future."

* * * * * *

(By Isaac Campbell, K. C. representing the power interests of the City of Winnipeg).

* * * * * *

For that additional level and for the foot or two feet in height of contour, the lands falling within an addi-
147 tional contour of a foot and a half, we should pay, and we should pay in full, although the riparian owners may for several years out of 25 be able to make some use of that foot or 1½ feet. But if they are liable to have it flooded 1 year out of 25, or 3 years out of 25, we can not with very good grace, nor with justice, and, I think not within the law, object to paying them for the full value of the land; and in recommending that value, it seems to be that you are not limited to the strict market value, not only the 10 per cent spoken of today, but 20 or 25 per cent might be added.

* * * * * *

As to making the compensation, we should be willing to pay fairly and in that sense liberally for the land that is injured, and that would be either condemned or taken over or whatever would be the procedure that would be adopted.

Mr. Mignault: When you say "we" whom do you mean?

Mr. Campbell: The Canadian power interests, the Dominion Government, so far as they own the power, and those that are now allotted or in use; and I am speaking for the community of the city of Winnipeg that I think we ought to pay a fair share, our full share and that there is no objection to its being computed fairly, and liberally, not put at the exact market value of 10 per cent, but at 20 or 25 per cent, that could be with safety added to what would be the estimated market value. And, more than that, that value should, as soon as your report is acted upon, be paid, then; that is, be paid now, without waiting until the time comes when we will need to raise the water. We do not need to raise it now. We do not need any regulation now. My clients can get along if the Lake of the Woods were treated as now, and they probably will for 8 or 10 years be able to do so. But it is not desirable that neither the riparian owners or ourselves should be in doubt about the legel height of the water avail-
148 able. It is not fair [—] them and not fair to us, and I think we should pay the full amount of the compensa-

tion that should be charged against us,—pay it now, and, although interest would be running on the money it would be avoiding trouble and doubt and anxiety, which would be well worth the use of the money, although you would not have the use of the added amount of water."

* * * * * * *

(D. H. Laird, representing the Winnipeg Electric Railway Company and the Winnipeg River Power Company.)

"As power users, we desire that higher levels, and, as indicated by Mr. Campbell and Mr. Rockwood, the power users consider that adequate and full compensation should be made to the landowners for the land necessarily taken for that higher level; but the method of levying that compensation upon the power users, of course, is a purely domestic matter. If the power users in Canada get the benefit of it, I have no doubt that the Canadian authorities would see that they would pay it ultimately. We are vitally interested in the best use of those waters. We have invested now in the plant in Winnipeg millions of Dollars. The direct investment at the power plant is very large, $6,000,000 at the power plant alone, and then we have all the investment in Winnipeg systems there, all dependent upon this power. Then we have spent $60,000 in the development of the new site at Great Falls. That contemplates an expenditure of seven million or eight million dollars for the ultimate development of that site. Our interest is very, very great in the most advantageous uses of those waters."

The Government objected to said offer on the grounds stated in connection with the foregoing offers to prove. The court sustained said objection, and respondents duly excepted.

In connection with respondents offer of their Exhibit 32 the material portions of which are above quoted, respondents offered to prove that the arguments, and the facts
149 contained in the arguments, as set forth in said respondents Exhibit 32 were circulated among the property owners here in question, and the public generally in Lake of the Woods and Roseau Counties wherein said lands are situated; and that the facts contained in said arguments were known by the property owners and the public generally in said two Counties. That the Government objected to said offer, the Court sustained said objection, and respondents duly excepted.

That thereafter respondents offered in evidence Respondents Exhibit 33, being the brief of Hon. C. J. Rockwood, counsel for Minnesota & Ontario Power Company, and other allied companies, presented by him to the International Joint Commission on the question of regulating the water of the Lake of the Woods, the material portions of said brief being:

"Added Power. The river which flows out of the Lake of the Woods is a great source of power, and the lake without artificial improvement is a great benefit to the river as a producer of power; but I shall point out that the control of the lake and of the waters that flow into it have added or will add not less than 100,000 continuous horse powers of energy to that which could be produced without such control. Perhaps much more could be accomplished. I shall deal only with the minimum.

"Value Of Power. These 100,000 horse power are, except in the matter of intelligence, equal to the labor of not less than a million men. Their work is perpetual. They produce power at a fraction of the cost of power from other sources. They do not perish with the using.

I reproduce from Water Resources Paper No. 3, page 274 a table of comparative costs of power in the city of Winnipeg:

150 Table 42. Comparison of the Cost of Fuel Power in Winnipeg with Power from Pine Falls.

	Capital Cost Installed Complete	Per Horse Power Year Load Factor			Per Kilowatt Hour Load Factor		
		25%	50%	75%	25%	50%	75%
250 H. P.	$	$ ¢	$ ¢	$ ¢	$ ¢	$ ¢	$ ¢
Steam	22,500	60.00	100.00	134.00	3.64	3.06	2.73
Diesel Oil	30,000	37.00	58.00	78.00	2.28	1.77	1.59
Producer Gas	27,500	47.00	77.50	108.00	2.88	2.37	2.20
Hydro-electric							
Initial	6,000	15.00	15.35	15.70	0.66	0.57	0.54
Complete	6,000	13.30	13.70	14.00	0.60	0.51	0.48
500 H. P.							
Steam	42,500	52.50	87.50	115.00	3.22	2.68	2.32
Diesel Oil	55,000	35.50	55.50	75.50	2.18	1.70	1.54
Producer Gas	50,000	42.50	70.00	97.00	2.60	2.13	1.97
Hydro-electric							
Initial	12,000	15.00	15.35	15.70	0.66	0.57	0.54
Complete	12,000	13.30	13.70	14.10	0.60	0.51	0.48

151 "The Effort of Regulation.

* * * * * *

It is disclosed by the actual surveys reported in Water Resources Paper No. 3, pages 224, 234, 258, that any development of two power sites, Lower Seven Sisters and Upper Seven Sisters, is from a practical point of view dependent on complete regulation of flow. With complete regulation, the first of these has a capacity of 37,900 horse power with wheels of 75 per cent efficiency, and the second 29,600 horse power with wheels of the same efficiency, or an aggregate of 67,500. This power is wholly lost by absence of complete regulation.

Estimates of water power capacity are traditionally based upon 75 or 80 per cent wheel efficiency. It is safe now to depend upon 90 per cent. This change in basis of efficiency would add 2,857 horse power to the 22,860 and 13,500 to the 67,500 making respectively 25,717 and 81000 or an aggregate of 106,717 produced by further regulation."

* * * * * *

"Total Effect.

Taking all the items of gain into consideration, the total result of complete regulation may safely be estimated at not less than 115,000 horse power, and probably as high as 125,000 in addition to making present regulation lawful beyond question.

The Value of Regulation.

Using the smaller figure, 115,000 horse power, as the result of regulation, and the low estimate of ten dollars per annum at the value of a horse power, the result is $1,150,000 per annum, or interest at five per cent upon $23,000,000.

152 That ten dollars is not a high estimate of the value of a horse power, is shown by the comparison of costs of hydro electric and other sources of power found in Water Resources Paper No. 3, page 275, and that the actual development and use of this power in the not distant future is a practical certainty, is shown by the fact that over 85,000 horse power have been actually developed at Kenora, Keewatin, Piniwa and Point DuBois, and that except for the war, work would have been fairly well under way before now on the development of another 1000,000 horse power at the DuBonnet Falls site.

The prediction would have seemed fanciful if made twenty-five years ago that this actual development would have occurred or would have been considered within this period."

* * * * * *

"Water Power Property.

A water power property consists not only in the riparian ownership of land suitable for the construction of a dam. Equally necessary are other property rights, such as flowage rights.

* * * * * *

The land necessary for this is part of the water power property. The site for storage reservoir, although remote, is equally a part of the water power property.

* * * * * *

In the case of the Winnipeg River, the remotest and smallest reservoir site in the hills of the northeastern Minnesota, or across the line in Ontario, is as necessary to the full development of the water power property whose wheels are to be turned at DuBonnet Falls, as is the location for the
153 dam and power house itself. * * * Likewise of every intermediate reservoir, Lake of the Woods, Rainy Lake, Namakan and all the rest. From time immemorial American law, and doubtless also Canadian law, has permitted the acquisition by compulsory process of these collateral properties as an aid in the development of water power.

In the United States, where the federal constitution and every state constitution permits the exercise of the power of eminent domain for public purposes only, some of the states have so defined the term "public use" as to exclude ordinary manufacturing enterprises and limit the term to such uses as the public would have some direct participation in."

"What shall the maximum be?

Value of Stored Water.

The quantity of water found in a single foot in depth of water on the surface of the Lake of the Woods will create in its fall to Lake Winnipeg 39,480 horse power continuous for one year with wheels of 80 per cent efficiency, and 44,415 horse power with wheels of 90 per cent efficiency. The commercial value at $10 per horse power per annum is $394,800 in one case, and $444,150 in the other. The Capitalized value, if this use can be repeated once every year, is from eight to ten million dollars.

It seems to be assumed in the engineers' testimony, February, 1916, meeting, page 214, that at least one hundred billion cubic feet of storage will be created in Rainy Lake and above, and it is contemplated that one hundred fifty billion may be created. The commercial value of the flow of fifty billion in its fall to Lake Winnipeg would be from five hundred to five hundred fifty thousand dollars, and the
154 capitalized value, if it can be repeated once each year, will be from ten to twelve million dollars."

"Value in Future.

It is a moral certainty that the time will shortly come when this power will have twice the value that is now estimated. Using the cost of coal as basis, it has more than twice that value now. These values are so great and so certain of realization that any and all damages suggested, in the highest and wildest estimates, are puny in comparison.

As soon as the demand appears for power on the Nelson River, and it is sure to appear soon, the figures used above to express the results and values must be doubled and trebled. To hesitate in the expenditure of a few hundred thousand dollars, for the cost of flowage rights and protective works, would be nothing less than crime against succeeding generations."

The Government objected to said offer on the grounds stated in connection with the foregoing offers to prove. The court sustained said objection, and respondents duly excepted.

That in connection with the offer of Respondents' Exhibit 33 Respondents offered to prove that the facts and information set forth in Respondents' Exhibit 33 were circulated among the residents of Lake of the Woods and Roseau Counties, and were known by such respondent-residents and by the property owners generally in those counties,—to which offer the government objected on the grounds heretofore stated, the court sustained said objection, and respondents duly excepted.

Thereupon respondents offered in evidence Respondents' Exhibit 36, being an editorial in the Manitoba Free Press of the City of Winnipeg, under date of June 3, 1922, the material portions of which editorial are:

155 "To the Manitoba power plants on the Winnipeg River, present and prospective, it is vitally important that there should be a regular, dependable flow of water. Win-

nepeg's municipal power scheme, the Manitoba Power Company's hydro-electric enterprise, the Winnipeg Electric Railway Company, and all future power concerns would be directly affected if Mr. Backus were allowed to use the flow from the Lake of the Woods, as he proposes, or else to levy a toll, as he would be in a position to do, on the Manitoba power companies for allowing the flow which they required. Rates for light and power would have been forced up and the advantage which this city possesses with its exceedingly cheap power for industrial purposes would have been considerably discounted. But the "dependable flow" was not only desired by Manitoba, but was clearly by highly competent authorities to be the best system for Ontario also."

"Mr. Backus' interests last year fought against this retriction with all the resources at their command. They claimed that they could not properly carry on their proposed pulp industry at the Lake of the Woods if the "dependable flow" plan were adopted and they could not have, intermittently, the maximum flow". * * * *

"It is supposed that Premier Drury in re-introducing his bill thinks that he can secure enough support in the Legislature this time to carry it. If he does, the situation in regard to power development in the Lake of the Woods District will be definitely settled. Power development in Manitoba will also, as a result be able to go ahead without the menace of serious interference with the flow in the Winnipeg River, or of the necessity of paying tribute to Mr. Backus. Mr. Backus will be able to proceed with his enterprise, forgetting about the imaginary handicap to which he says he is being subjected. And Mr. Peter Heenan, M. L. A. and his constituents in Kenora will realize in time that they are not going to suffer as a result of the regulating of power development in the manner proposed, but that their town and district will benefit from the control and protection that is being provided."

The Government objected to said offer on the grounds stated in connection with the foregoing offers to prove. The Court sustained said objection, and respondents duly excepted.

The Government's objection was stated in the following terms (By Mr. Harries) We object to the exhibit and its reception in evidence on the ground that it is hearsay, incompetent, irrelevant and immaterial and no proper foundation has been laid for its introduction; and to the offer

with reference to the knowledge of the people in Roseau and Lake of the Woods Counties, of the contents of this editorial, we object on the ground that that is immaterial.

That in connection with respondents' offer of their said Exhibit 36, respondents offered to prove that said editorial, respondents' Exhibit 36, and the facts recited therein, were known and discussed by the people living in Lake of
156 the Woods and Roseau Counties. The Government objected to said offer of proof, the court sustained the said objection, and respondents duly excepted.

Respondents next proved by P. C. BULLARD and Respondents' Exhibit 58, being the annual report of the Chief of Engineers, U. S. Army for 1930, that the U. S. Government, up to and including 1930, has expended on account of the Lake of the Woods project, pursuant to the Treaty of 1925, and the Acts of Congress conformable thereto, the following sums:

All costs in connection with flowage easements	$127,697.19
Protective works and measures	179,865.67
Investigation relating to past damages	47,044.23
	$354,407.09

E. E. CORRY called as a witness on behalf of the Government testified, among other things, that he was charged with the duty and responsibility of obtaining the flowage easements in question. On cross-examination Mr. Corry testified that in connection with his duties in acquiring said easement that he mailed, on behalf of the government, letters to 97 property owners, who owned land below contour 1064 on which the government desired to acquire a flowage easement. That those letters contained offers to the said property owners of the amount which the government was willing to pay for said flowage easement. That the said offers which the government submitted to said property owners were based on "general land values in that territory."

"Q. And I will ask you whether you submitted any offers to any of these property owners that included any element for reservoir value, or flowage value of those lands?
157 A. Any specific mention, you mean?
Q. Well, we will take it that way, if you wish, and then take the other half later.

A. No, we were not buying a reservoir. We were buying an easement on the land, based upon the market value of the land as we were able to determine it."

* * * *

Mr. Corry further testified that he was unable to reach some of the 97 property owners to whom he mailed offers, and that out of the 97 offers submitted only seven of the property owners made conveyances to the government.

Referring to lands below contour 1064 Mr. Corry further testified on cross-examination:

"Q. You also stated that the government had withdrawn those lands from entries some time along in there. When were they withdrawn?

A. Early in 1928, if I remember correctly.

* * * *

"Q. So that you found there was a greater demand, or a greater number of entries made for lands below 1064 than were being made for lands above 1064?

A. We did not investigate as to lands above 1064.

Q. But you did find that there was a rather increased interest in the lands below 1064?

A. Yes. There seemed to have been quite considerable activity there for some years before that time.

Q. You say for some years before that time?

A. Yes, sir.

Q. For how long before 1928 did you find that there had been some increased interest in the lands below 1064, and that that interest was reflected in the number of applications by homesteaders for those lands?

A. We found the greatest number of entries in any one year, except possibly the first year or two that those
158 lands were opened for settlement in 1898 and 1899, were in the years 1919 or 1920, shortly after the International Joint Commission had filed its report.

Respondents then rested.

Prior to the introduction of respondents' evidence and in opposition to respondents' offer to prove, the government objected to the introduction of any evidence and demurred to such evidence on the grounds set forth in the foregoing pages. The said demurrer having been overruled by the court, the government then proceeded in support of its contention to introduce evidence.

Mr. E. E. Corry was called as a witness on behalf of the government, as set forth in the amendments to the bill of exception proposed by the government.

The Government called ADOLPH F. MEYER, who testified that there are approximately 31,354 acres within the boundary of the State of Minnesota affected by said easement, and a total of 46,727 acres in the Dominion of Canada affected by said easement.

The Government in support of its objection and demurrer to the evidence and offers presented to the court on behalf of respondents, introduced in evidence Chapt. 24 of the 2nd Session, 50th Congress, approved January 14, 1889, and contained in 25 Statutes, [Capt.] 642, the same being entitled "An Act for the Relief and Civilization of the Chippewa Indians in Minnesota," and in that connection also introduced in evidence the treaty entered into between the U. S. Government and the Chippewa Indians, same being Government's Exhibit 9 and 10, it being the contention of the government that according to the terms of said treaty and said Act of Congress, the government has a right to flood
159 respondents' lands without the payment of compensation therefor. The government's contention and demurrer on that proposition was overruled by the trial court.

There was further evidence introduced by the government on the value of respondents' lands for agricultural purposes, and some evidence was introduced on that point by respondents, but that evidence is not material in the determination of the questions involved on this appeal.

On the close of the testimony respondents' requested the court to give the following written instructions to the jury:

(Instructions to Jury Requested by Respondents and Overruling Thereof.)

1. The jury is instructed to return a verdict in favor of each respondent for the fair value of the flowage easement which petitioner is seeking to acquire on each of said respondents' lands, as disclosed by the evidence.

2. In computing the amount of compensation to which each respondent is entitled, you should award him such an amount as will justly compensate him for his property taken by petition in these condemnation proceedings. You should take into consideration all of the uses for which respond-

ents' said lands and property are suitable and to which you find from the evidence that his property was adapted on May 4th, 1929, and determine which of said uses is the most valuable and base your award thereon.

3. You are instructed that each respondent is entitled to your verdict for such an amount as will justly represent the fair value of his property for the most valuable use to which it was plainly adaptable and available on May 4th, 1929.

4. You are instructed that you should award each respondent such an amount as will justly compensate him for the fair value for flowage and storage purposes of so much of his property as petitioner seeks to acquire by these proceedings, provided you find that his property was suitable for flowage purposes and that such was its most valuable use."

That the government objected to each of said requested instructions, that the court sustained the objection, and refused to give the same, except as contained in the general charge, and that respondents duly excepted to each of said refusals of the court.

That thereafter the court instructed the jury as follows:

Charge to the Jury by the Court.

The Court: Members of the jury: In 1925 the United States and Canada entered into a treaty for the purpose of regulating the lake levels of the Lake of the Woods. The Lake of the Woods as you know constitutes international waters, and lies on the northern boundary of this state. The testimony shows that contains some 1500 square miles of surface, and that the shore lines of the main shore extend for some 1500 miles. It appears that for more than thirty years, the waters of the lake have been controlled by dams at the outlet of the lake, and that the water has been maintained some three feet on an average above its natural level. Some of those interested in the lake, wanted the water to be maintained at a high level, while other interests wanted a low level. The International Joint Commission undertook to determine the stage or stages of water in that lake which would produce the greatest aggregate benefits for all interests, power, navigation and fisheries. That Commission reached the conclusion that the waters of the lake should be controlled so that the ordinary high water levels should be

at 1061.25 feet above sea level, and that the maximum high water level should be 1062.5.

The Commission estimated that when the water stood at 1062.5, the shore lands would be adversely affected up to level 1064, by seepage and wind and wave action, and that that should be taken into consideration in acquiring the right to flow the shore lands. The treaty put into force the recommendations of the Commission, and the United States, pursuant to the treaty, proceeded to acquire the rights against the shore lands on the American side of the lake, to maintain the lake levels as provided for in the treaty. The proceeding to impose this easement of flowage, or the
162 right to flow the land, was commenced some time ago. Commissioners or appraisers were appointed by this Court, to fix the amount of damages to which each owner of shore lands was entitled. The Commissioners made their awards which in some cases were unsatisfactory to the owners, and in other cases unsatisfactory to both, and in still other cases unsatisfactory to the Government. Appeals have been taken from the awards of damages in a number of cases, and as a result, you are here to determine for us what compensation shall be paid by the Government to the property owners for the lands involved in this case.

The Government has a right to take private property for a public use upon payment of just compensation. Just compensation is to be measured by the loss caused to the owners by reason of the taking. The compensation must be the full equivalent in money of what is taken. It must be based upon the most favorable use for which the land is adaptable. The owner is entitled to be placed in as good a position from a money standpoint, as he would have been in had his property not been taken. It is what the owner loses, and not what the Government or anyone else gains, which measures what the Government must pay.

In this case the Government is not taking the lands themselves, but is taking an easement upon them; that is, it is taking the right to flow them in accordance with the levels provided by the treaty.

There is no doubt, and no question, but that the maintenance of the treaty levels will damage these lands here involved to some extent, but the amount of damage to each tract is in dispute. Neither counsel nor I can tell you what the amount of damage is. We no doubt all have our opinions as to what it is, but our opinions are not binding on anyone. It is for you to tell us what the damages are, basing your

judgment on the evidence and the law as I give it
163 to you. It is my duty to tell you, as accurately as I can, what the law is as it applies to this situation, and it is your duty to say what, under the evidence and the law, the Government is required to pay to each of the property owners.

The rule is that the owner of land on the shore of such a lake as this has title to his land to the natural low water mark of the lake. His riparian rights, that is, his shore rights, or his rights to the use of the shore and the waters of the lake extend to the ordinary high water mark of the lake under natural conditions. The ordinary high water mark is the highest level of the ordinary natural lake bed, the level at which lands would not be usually used for agriculture because of the waters of the lake standing upon them for such long periods of time as to prevent their being so used.

Mr. Meyer, who was one of the consulting engineers for the International Joint Commission, has testified in this case that it was determined by him and his assistants that the natural ordinary high water level of the Lake of the Woods was at level 1059, that representing the level at which the water would have stood during 20 per cent of the growing season, and it is understood that for the purpose of this case, that that will be considered to be the ordinary high water level of this lake in a state of nature. It is important to keep that in mind, because it is the law that the Government may, for public purposes, maintain the levels of any lake such as this, up to the ordinary high water mark, without paying any compensation to the owners of shore lands; in other words, the Government may use the entire ordinary lake bed for the storage of water, without paying anything to anybody therefor. It is only when the Government pushes or raises
the lake above its ordinary bed, that it becomes liable
164 in damages, and then it becomes liable only for such damages as are occasioned by maintaining the levels at these stages above the ordinary high water level. The owner of the shore lands is only entitled to damages, as I have stated, when the lake is raised above its ordinary high water level; so in this case, whatever damages will be done to these lands by maintaining lake levels up to 1059, could not be charged to the Government, and it is only for damages that will be occasioned by raising the water above 1059, for which the Government is responsible.

As I have stated before, the levels fixed by the treaty are these; the ordinary high water level is 1061.25; the maximum

high water level is 1062.5; and the testimony is that the effect of seepage and wave action and wind action will adversely affect the lands when the water is at 1062.5, up to 1064, and the Government desires to have the right to flow these lands up to the treaty level, and desires to pay the owners of the property the damages they are entitled to, in consideration for the acquisition by the Government of that right.

Mr. Meyer, who as I stated before, the engineer for the International Joint Commission, and who testified here before you, gave it as his opinion that for 50 per cent of the time under the treaty, the average water levels will be about 1060, and that for the balance of the time they will be somewhat higher than that, but will be at 1061 or 1061.25, 25 per cent of the time; and occasionally they will reach the level of 1062.5 during seasons of high water or excessive rainfall.

It must be remembered that the levels are not under the control of private interests, but are under control of Governmental authority, and that we must assume that the levels will be maintained as provided for in the treaty, and that all the Government is acquiring here, or asking for, is the right to maintain those levels.

165 It is not necessary for me, and it would serve no useful purpose, to attempt to review the evidence which has been presented before you. You have the maps showing the locations of these lands, and the vegetation or timber which is growing upon them. The maps show the contours and they show to what extent the lands will be flooded if the waters are maintained at different levels. You have also your notes of the testimony of the various expert witnesses who have testified as to values, and counsel have explained to you the contentions of the Government and the contentions of the property owners.

The first question for you to determine with reference to each piece of property involved in this proceeding is this; what was the fair market value of this property under natural conditions on May 4, 1929 at the time the easement was imposed, taking into consideration the right of the Government to maintain the levels of the lake up to level 1059. The next question is, what was the fair market value of this same property on May 5th, with the easement imposed upon it. By deducting the value of the property after the easement was imposed, from its value before the easement was im-

posed, you reach the amount of damage, the amount which the Government ought to pay.

You have nothing to do in this case with past damages. That question is not to be determined in this proceeding. The fair market value of a piece of property is the amount which a person who was willing but was not compelled to sell, would receive from a buyer who was willing but not compelled to buy. Another way of putting it is, fair market value is the sum that would in all probability result from fair negotiations between an owner who is willing to sell, and a purchaser who desires to buy.

In computing the fair market value, both before and after the imposition of the easement, you will take into con-
166 sideration all of the uses for which the property was available on May 4, 1929, and May 5th, 1939, and determine what use it was most valuable for, and base your award thereon; but you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for those purposes that you are to value these lands.

It may be that Mr. Olson's property has also a use for fishing purposes, and if it has, you will add to the value which it might have for agricultural purposes, any added value which might accrue to it, because of its usefulness as a fishing station.

Now there is nothing in these cases to excite either sympathy or prejudice. As you understand, at the outset of this case perhaps the most controverted question was the question as to whether in determining the value of these lands, any added value could be accredited them because of the fact that they formed the boundaries or shores of what would be a very large reservoir, which would be used in part for the benefit of power companies on the Winnipeg River. I have held that as a matter of law, that question does not come into this case under all of the circumstances, so that you have absolutely nothing to do with it, and will not consider it in any way in your deliberations. If I am wrong in the position I have taken, I am subject to correction by a higher court, but the difficulty with you is, that your

conclusions are going to be binding upon all of us, so do not let yourselves be influenced in any way by any inclinations or feelings of sympathy, prejudice or passion.

167 Consider this question as involving nothing except these particular lands, and ask yourselves what under the evidence was the fair value, the fair market value of each piece of property on May 4th, without the easement upon it, and taking into consideration the right of the Government to use the ordinary natural lake bed up to level 1059 for navigation purposes. Then ask yourselves what the fair market value of these different tracts was after the imposition of the easement, and solve the problem just as you would any problem of mathematics, or anything else, without regard to any personalities, or the fact that the property owners are on one side of the controversy and the United States Government on the other side."

So far as we are concerned, we must assume that the property owners believe they are justified in their contentions, and that the Government believes it is justified in its contentions, and we must treat them both with absolute fairness. The property owners ought to receive every dollar that they are entitled to receive, and on the other hand they ought not to receive a dollar more than they are entitled to. The Government ought to pay every dollar it owes them, but it ought not to pay a dollar more than it owes them.

Now you are the sole and exclusive judges of the facts in this case. The facts you will determine from the evidence which you have heard here in Court, and from nothing else, and in reaching your conclusions you will rely upon your own recollections of what the evidence is. You are also the judges of the credibility of the witnesses, and the weight of the evidence; that is, it is for you to say what witnesses have told the truth upon the witness stand, and how convincing the testimony of each witness is. In doing that you will take into consideration the appearance of the witnesses, the manner in which they gave their testimony, the opportun-
168 ities that they have had to know the things about which they testified, the reasonableness or unreasonableness of the testimony which they have given, and any interest which they may have in the outcome of this case. If you believe that any witness has wilfully testified falsely to any material fact, you may in your discretion entirely disregard the testimony of that witness except insofar as it may be corroborated or supported by any credible evidence in the case. In determining or in passing upon the weight of the evi-

dence given to you by the expert witnesses who testified as to values, take into consideration their appearance also, the manner of men that they appear to be, the experience that they have had, the reasons which they were able to give you for the conclusions which they expressed. The purpose of expert testimony in all cases is to assist the jury in arriving at a correct conclusion. You are not bound in any way by the testimony of any of these experts. You will follow their testimony no doubt so far as it accords with your own judgment, if it is shown by the evidence to be the true value of these lands; but after all, what we are asking you for, is your own best judgment as to what, under the law and the evidence, constitutes the damage done to these lands by the taking of the easement in question.

When you go to your jury room, select one of your members as foreman, and let him preside over your deliberations. You will return a verdict of course as to each separate tract, and the verdict will read in this way: "We the jury in the above entitled cause, find that the damages to which the respondents are entitled are as follows;" then the name of the respondent or property owner, and the number or numbers of the easement, and then a dollar sign. After the dollar sign you will put the amount of damages which you will find that that particular property owner is entitled to be-
169 cause of the imposition of the easement upon the tract which he owns.

Mr. Lewis: Respondents take exception to the Court's refusal to grant Respondents' request number 1 for instructions to the jury; respondents except to the refusal of the court to grant respondents' request number 2 for instructions to the jury; respondents except to the court's refusal to grant respondents' third request for instructions to the jury; respondents except to the court's refusal to grant their fourth request for instructions to the jury; respondents except to that portion of the court's charge, wherein the court instructed the jury in substance that the jury is not permitted to consider the value of respondents' lands for flowage or reservoir purposes, and that they are to consider only the value of said lands for agricultural purposes, with the exception of Elias Olson's property.

The Court: As I understand, you are not claiming that except for reservoir purposes, the lands have any greater value for any other use than agriculture?

Mr. Lewis: That is right. The purpose of the exception is simply to save the right of the respondents on the issue of

reservoir and storage purposes. I take it that is a sufficiently comprehensive exception to that portion of the charge?

The Court: Yes. The record may show that, so far as I am concerned, and that that calls my attention to the exact portions of the charge which are objected to by the respondents, and which were those portions which directed the jury to eliminate from consideration any question of the value of these lands for power or reservoir purposes.

* * * * *

Thereafter the jury retired, with an officer, for deliberation on its verdicts.

170 (Jury returns to court room for further instructions.)

The Court: Now, I understand that the Jury are having some difficulty in agreeing upon a verdict in these cases. I think, perhaps, it might help you a little bit if I told you that the last thing in the world that the Government wants in these cases, or that the property owners want, is a disagreement. I think, as I told you before, that you understand that one of the most important and perhaps the principal question in these cases is a question of law that I decided, as to whether the evidence of reservoir values could be introduced in these cases; and I held that it could not be introduced, and the record has been made here for the purpose of taking that question to the Court of Appeals, and that is a very important question to be determined in these cases, since it will affect a great many other cases.

Now, the question of the value of this land is also an important question, and it ought to be determined accurately, and I am not in any way trying to coerce you in surrendering your own opinions about it, or to change your minds with reference to it. And while that is an important question, it is very, very important that you reach an agreement as to the value of these lands, one that will fairly represent the judgment of the Jury as to what the Government should fairly pay, leaving out the question of reservoir values. And I merely suggest that you go over the matter that you were in dispute about calmly and carefully, and that those who happen to be in the minority will reason with the majority, in respect to the opinions that they have reached, and see if you cannot reach an accord in those opinions, so that we may have a verdict, and so that the parties who are interested in the question of law may be able to get all those questions determined on the appeal.

171 (Verdict and Judgment as to Elias A. Olson, February 13, 1931.)

(A) Elias A. Olson.

The Jury in the above entitled action is returned into Court and being called, all being present, they do render their verdict wherein by their foreman they do say:

"We, the jury in the above entitled cause find that the damages to which the respondent is entitled are as follows:

Elias A. Olson, Easement No. 147 $490.00 Four Hundred ninety and no/100s Dollars.

Dated this 13th day of February, 1931.

C. D. OLSON, Foreman."

Wherefore, in accordance with said verdict, it is by the Court

Considered, Ordered and Adjudged that the respondent herein, Elias A. Olson, do have and recover of and from the petitioner herein, The United States of America, said sum of $490.00.

It is further ordered that a stay of forty-two days from this date of all proceedings, excepting the entry of judgment be and the same hereby is granted said parties, within which time they may make a motion for a new trial or take such steps in the premises as they may be advised.

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172 (Verdict and Judgment as to Randor G. Karlson, February 13, 1931.)

(B) Randor G. Karlson

The Jury in the above entitled action is returned into Court and being called, all being present, they do render their verdict wherein by their foreman they do say:

"We, the jury in the above entitled cause find that the damages to which the respondent is entitled are as follows:

Randor G. Karlson, Easement 86-87 $880.00
Eight hundred eighty and no/100s Dollars

Dated this 13th day of February, 1931.

C. D. OLSON, Foreman."

Wherefore, in accordance with said verdict, it is by the Court

Considered, Ordered and Adjudged that the respondent herein, Randor G. Karlson, do have and recover of and from the petitioner herein, The United States of America, said sum of $880.00.

It is further ordered that a stay of forty-two days from this date of all proceedings, excepting the entry of judgment be and the same hereby is granted said parties, within which time they may make a motion for a new trial or take such steps in the premises as they may be advised.

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173 (Verdict and Judgment as to Harry Brewster, February 13, 1931.)

(C) Harry Brewster

The Jury in the above entitled action is returned into Court and being called, all being present, they do render their verdict wherein by their foreman they do say:

"We, the jury in the above entitled cause find that the damages to which the respondent is entitled are as follows:

Harry Brewster, Easement 247, 248-252 $900.00
Nine Hundred and no/100s Dollars

Dated this 13th day of February, 1931.

C. D. OLSON, Foreman"

Wherefore, in accordance with said verdict, it is by the Court

Considered, Ordered and Adjudged that the respondent herein, Harry Brewster, do have and recover of and from the petitioner herein, The United States of America, said sum of $900.00.

It is further ordered that a stay of forty-two days from this date of all proceedings, excepting the entry of judgment be and the same hereby is granted said parties, within which time they may make a motion for a new trial or take such steps in the premises as they may be advised.

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174 (Approval of Bill of Exceptions by District Judge.)

I, the undersigned, Judge of the above named court who tried the above entitled actions, do hereby sign, settle and allow the foregoing bill of exceptions as amended by order as containing an accurate statement and recitation of

the evidence, offers to prove, exhibits and excerpts from exhibits, demurrer, objections, rulings of the court, exceptions, request for instructions to the jury, the instructions to the jury, and all proceedings recited therein, and I do hereby certify that said bill of exceptions accurately sets forth so much of the evidence, offers to prove, record and proceedings as are necessary to the consideration and determination of the issues and questions involved on the appeal in said actions.

Dated at St. Paul, Minn., this 30th day of July, 1931.

By the Court:

JOHN B. SANBORN,
U. S. District Judge.

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175 Amendments of Bill of Exceptions.

Referred to in Paragraph Number 1 of the Order of Court, Sanborn, J., dated July 30, 1931.

Allowing Amendments of Bill of Exceptions.

176 The Court: * * * It seems to me that the logical way to go at this thing is to prove and show all of the facts and circumstances in connection with the lake itself, upon which the respondents base their claim that the reservoir value enters into the,—that is, that the availability of this land for reservoir purposes enters into the question of value. Now, it seems to me that the question of whether it does enter into it will depend very largely upon the situation of the thing, that is, the size of the lake, the amount of water, and other things, and the miles of shore line, and the ownership of the lands, and doubtless a great many other factors which do not strike me now as very important from the start off. And why would not it be well for Mr. Meyer to go into that,—undoubtedly he knows the entire situation up there,—and have him testify as to the size of the lake, and the miles of shore line, and the drainage area; that may be important.

Mr. Harries: I should like to say to the Court, that if counsel for respondents is not prepared to present the necessary evidence of the actual conditions and circumstances of the Lake of the Woods, I will say that the Government is, and we would move the Court for leave to introduce that testimony out of order, so that the Court will be in a position to rule on the evidence which Mr. Lewis is trying to bring out. This motion was allowed, and

EDWIN E. CORRY, a witness called by the Government, being first duly sworn, testified as follows:

I was graduated from the Louisiana State University in June, 1902, in the Civil Engineering Course at that institution. Since that time I have been practicing engineering principally with the War Department engineers on river and harbor work. In May, 1927, I was appointed to carry out the work assigned by Congress to the War Department to secure flowage easements on the Lake of the Woods. First we had to determine just what lands were affected. We went onto the ground with an office located at Warroad, Minnesota, and determined the ownership of each and every parcel. We were able then to group the lands into tracts under various ownerships. In addition to the duty assigned
177 by the War Department of acquiring flowage easements by purchase or condemnation, I was charged with the determination of claims for damages previously sustained. This work concerned the very same land as those upon which an easement was to be acquired. The work required a careful study of the ownership of the lands in order to determine who should receive the damages.

(Government exhibit numbered 3, received in evidence showing the lands bordering on Lake of the Woods in Minnesota outlining in colors the different classes of ownership as follows: (on May 4, 1929, the date of the award of the Commissioners in this proceeding)

Yellow—privately owned lands on which flowage easement is to be acquired.

Black—Public lands owned by the United States.

Green—Lands owned by State of Minnesota subject to contract for sale to private parties.

Red—Land in possession of private parties by reason of homestead entries only.

The American shore line bordering immediately on Lake of the Woods comprised about 550 tracts. Not all of them touched the waters' edge, but all are within the flowage lines prescribed by the treaty, that is, below elevation 1064 sea level datum.

In addition to that there were some 300 tracts and small parcels located along the Rainy River and on streams tributary thereto, making approximately 850 or 860 tracts of land affected by the regulation of the levels of the lake. The number of tracts and the number of fee owners are not

equal: in some instances one person owns several tracts; the approximate number of property owners of lands within the flowage zone affected by these proceedings is 775 to 800 persons.

178 We measured the length of the shore line in the United States and Canada from maps which were part of the records of the District Engineer of the United States War Department at Duluth, Minnesota, and our findings in this regard were as follows:

Mainland shore line in the United States, 155 miles.

Island shore line within United States territory, 33 miles.

Total United States mainland shore line and island shore line, 188 miles.

On the Canadian side we found:

Mainland shore line 1280 miles.

Canadian islands 1625 miles.

Total Canadian shore line 2905 miles.

Shoreline including islands and mainland, United States and Canada, 3092 miles.

It was part of my official duty to ascertain the respective owners of the tracts affected. My findings in that regard were as follows:

Individual ownerships of land in the zone affected by the treaty regimen of levels, 775 to 800;

Mortgagees and other legal interests, 1200 to 1400,—(we have an actual count up to more than 1200.)

In many instances the owners could not be found. There have been a number of deaths of owners and probate proceedings have been instituted and carried through in some of these cases, but not in all. We have made a somewhat careful study of that situation in connection with the investigation and reports on claims for past damages.

In the discharge of official duties and in going upon the various lands on the American side, I learned the geographical distribution of persons owning or claiming to own an interest in the lands affected by the flowage easement sought in this proceeding, in order to determine whether such owners were within the State of Minnesota or where they might

be. In that connection I have now a memorandum
179 showing the information:

Persons living in the vicinity of the Lake, located generally on their own lands or in the counties in which these lands are located, 496.

Persons having an interest in these lands living elsewhere in the State of Minnesota, 186.

Persons living outside of the State of Minnesota, but in the United States, 102.

Those living in Canada, but having an interest in American lands, 21.

Persons who have died since they came into possession of these lands or since time of acquisition, 21.

Persons whose addresses are unknown; 401.

Total number of persons whose interests are shown in the records of the office of the District Engineer of the War Department, 1227.

In the discharge of the duties assigned to us under the Act of Congress which charged the War Department of the United States with the acquisition of flowage easements by purchase or condemnation, we secured conveyances of the right to overflow shore lands in accordance with the treaty in 7 cases.

Government exhibit 25 received in evidence. (The witness, continuing)—This is a tabulation based upon the statistical data contained in Gov't Ex's 18, 19 and 20, and compiled from records on file in the office of the District Engineer, at Duluth, Minnesota, of the U. S. War Department and other government records. The table shows homestead entries, patents, homestead entry cancellations, with totals showing the area of lands on the shores of Lake of the Woods in the United States included in these proceedings, both government and privately owned, for each year from 1897 to 1930. It also shows the lake stage for each year. Footnotes thereto show when these lands were opened for settlement, the date of the first hearing of the International Joint Commission, and date of filing of final report thereof and dates of withdrawal from homestead entry of remaining public lands.

Government exhibits 26 and 27 received in evidence,—certificate of Henry L. Stimson, Secretary of State, to executive withdrawal from homestead entry, of certain lands affected by flowage easement.

180 Government exhibits 28 to 54 inclusive, received in evidence.

By Mr. Harries: The government offers in evidence its exhibits bearing numbers 28 to 54, inclusive. They are offered severally and collectively. The exhibits are certified copies of deeds of tracts of lands in the area affected, and are offered for the purpose of showing that trading has been going forward in these lands during the period covered by the exhibits, namely, from 1910 to 1926, and the point that the government has in mind in this connection is to demonstrate that the value of this land is not limited purely to their intrinsic value, but that trading has been going on and exchanges made in the titles.

Mr. Lewis: They are objected to on the ground that they are incompetent, irrelevant and immaterial. I think it is fairly well settled that evidence of an isolated sale is not evidence of value, unless there is also shown all of the circumstances attending the sale, and I believe the usual rule is that the Court will not go into all that collateral inquiry. With reference to each one of these deeds, if they are admitted as evidence, it would be competent and proper for the respondents in each case to show the circumstances under which that particular deal was entered into.

The Court: Do they purport to be all the deeds of lands which have been made within a certain period?

Mr. Harries: No, I believe not. I don't think that all deeds of record during that period are here. The purpose is not to show the value, Your Honor.

The Court: Simply to show that there have been conveyances during this period, and they are not offered for the purpose of showing value?

Mr. Harries: No.

Mr. Lewis: Well, I have not seen them, so I don't know—counsel can probably tell us—whether they do recite value.

The Court: They are complete deeds, I suppose?

181 Mr. Harries: Yes, I believe that some of them do recite the consideration.

Mr. Lewis: Objected to further on the ground that they are hearsay and not the best evidence.

The Court: Well, I think I will receive them at this time and allow an exception, and it will not be necessary to read

them to the Jury, and if you wish to move to strike them out later on, before the case is finally submitted, you can do that, and we will consider the matter. That later respondents' motion to strike said exhibits was denied and exception noted.

Q. (by Mr. Harries) I now show you Government's Exhibit 25, and ask you to state what that is?

A. A tabulation showing the lake stages, homestead entries, and patents, tracts bordering on the Lake of the Woods in the affected zone, meaning by that, the territory with which we are concerned in these proceedings.

Q. It also shows the maximum and minimum lake stages in certain months for the open water, during the years from 1897 to 1929? A. Yes, sir.

Q. Where are these lake stages taken from—from where are the figures obtained?

A. They are taken from our gauge records or curves. The record is shown as a continuous curve, showing through all of these years.

Q. And they also show the natural levels during the same period of time? A. The computed natural levels.

Q. And then it shows the homestead entries on the tracts that are affected by the Lake of the Woods flowage, giving the number of tracts entered in each year, and the number of acres acquired by such entry? A. Yes, sir.

Q. And also indicates the cancellations of homestead entries?

A. Yes, both the numbers of tracts, and the acres; the total acreage under homestead entry in each year, and the number of acres below the 1064 contour entered in each year; and there is also an entry as to the tracts which

182 passed to private ownership by patent for each year, giving the number of tracts so passed, the acres, and the succession of acres each year, so as to show the total number of acres that were passed at the end of each year.

Q. Now, is that table simply a compilation of matters that are shown in Government's Exhibits 18, 19 and 20, the certificates of the Register of the Land Office at Cass Lake, except for the lake stages which you say are taken from your level curves in your office?

A. What was that question? You mean it does not include the Rainy River?

Q. Well, it does not include the Rainy River, and is limited to the lands in the Northwest Angle, and the south shore of the Lake of the Woods? A. Yes.

Q. In other words, it represents a tabulation of data contained in somewhat voluminous form, in the certificates of the Register of the Land Office? A. Yes, sir.

Q. Except for the lake [states], which are compiled from the basis you mentioned? A. Yes, sir.

Government's original exhibit numbered 24, received in evidence. This is the Atlas accompanying report of the Consulting Engineers to the International Joint Commission, relating to Lake of the Woods levels.

Mr. Harries: I will offer in evidence Government's Exhibit 25.

Mr. Lewis: Objected to as incompetent, irrelevant and immaterial, that it is hearsay, a conclusion, and no foundation laid, and that it is not the best evidence.

The Court: It will be received and exceptions allowed.

Q. Now you may state, Mr. Corry, the number of acres of land in the Angle, and on the north shores of the lake, owned by the United States in 1897, and 1898 and 1899? As shown by Government Exhibit 25?

Mr. Lewis: May the record show an objection to all this line of testimony, and an exception, on the ground that it is incompetent, irrelevant and immaterial, as calling for a conclusion, and as not the best evidence?

The Court: Yes, and exception allowed.

183 A. Taking into account all land, any part of which is in the tracts included in the three petitions, Lake of the Woods Petition, meaning the first, second and third petitions, which cover lands in the Northwest Angle, lands of the United States in the Northwest Angle—

Q. And owned by the United States, or do you mean lying in the United States? A. Lying in the United States.

Q. Oh.

A. On the south and west shores of the lake, there was a total of approximately fifty-five thousand acres in the year 1897.

Q. And in the year 1898?

A. In the year 1898 approximately fifty-one thousand acres; 1899, forty-nine thousand acres.

Q. The exhibit has been received in evidence and I don't think it is necessary to read all of the list. If you will come to 1920—I can line that out for you perhaps.

A. Sixteen thousand acres.

Q. And between 1920 and 1922 it ranged from sixteen thousand to fifteen thousand acres? A. Yes, sir.

Q. And from 1922 to 1928 it ranged from thirteen thousand down to eleven thousand acres roughly, and in round numbers?

A. It dropped to eleven thousand eight hundred acres in 1928.

Q. And in 1929 and 1930 I notice that it increased from eleven thousand up to thirteen thousand and fourteen thousand in those respective years. How do you explain that?

A. There were a great many cancellations.

Mr. Lewis: Is this material?

The Court: Well, he may answer.

Q. You say there were a great many cancellations of homestead entries?

A. Yes, there were a great many cancellations of homestead entries.

Q. So that the United States thus re-acquired approximately two thousand or three thousand acres during that period, by the cancellation of homestead entries?

A. Yes, sir.

Q. I notice some foot notes here. Are they part of the compilation made from the basis of the government exhibits referred to?

A. The first two footnotes relate to the use of opening the land for settlement in different locations. Lands on the south and west shores were opened for settlement October 3, 1898, and those in the Northwest Angle were opened for settlement on June 15, 1904.

184 Government Exhibits 28-54, inclusive, received in evidence. These exhibits are certified copies of deeds of lands within the area affected by this proceeding. These deeds were executed between 1910 and 1927. This atlas (Government's Exhibit 24) shows the governmental subdivision of lands within the zones of the easement herein sought and the legal descriptions in the deeds (Government's Exhibits 28-54, received in evidence) locate the lands, in which trading was going on within the area affected by the easement for a period of fifteen years before the execution of the treaty concerning the Lake of the Woods.

The following additional evidence was received in support of the Government's objection to the admission of evidence of reservoir values of respondents' lands:

Mr. Harries: In addition to the testimony heretofore offered, the Government offers as further foundation for its objection to the introduction of any evidence touching reservoir values on the Lake of The Woods margin, Government's Exhibit 9, which was presented in another connection, being the agreement of July 8, 1889, House of Representatives Executive Document No. 247, 51st Cong. 1st Sess., and Government's Exhibit 10, with certificate attached to it, and Government's Exhibit 11, map of the ceded territory from the Red Lake Band of Chippewa Indians, pursuant to the Act of Congress of January 14, 1889; Government's Exhibits 22 and 23, which are also maps of ceded territory; Government's Exhibits 12, 13 and 14, 14½, 15, 16 and 17, which are certified copies of homestead applications under the Chippewa Act of 1889. I might state, by the way, that the reporter in numbering exhibits, failed to number one, which has now been numbered as Government's Exhibit 14½. We also offer Government's Exhibits 18, 19 and 20, being certificates of the General land office at Cass Lake, showing the time of opening the land for homestead entry, and the time that entries were made.

The Court: They will be received.

185 Mr. Lewis: "Well, I suppose they are already in evidence, and he can use them for all purposes."

The Court: "Alright."

Objection and exception allowed.

The statutes, and exhibits previously introduced in evidence, and now presented as a further foundation for the Government's objection to the introduction of any evidence touching reservoir values on the margin of the Lake of the Woods, were laid before the Court by the following proceedings:

Mr. Harries: The United States objects to the introduction of any evidence and demurs to the introduction of any evidence in support of any claim for compensation for damages accruing from the overflow of any of the lands involved herein on account of the construction and maintenance of dams for the purpose of creating reservoirs in aid of navigation, and I should like just a few moments to designate to the Court the Acts of Congress and official documents which support this objection and demurrer.

Mr. Harries: The Acts of Congress which are brought to the attention of the Court, in support of the objection on the

part of the United States to the introduction of any evidence, and demurrer to any evidence in support of any compensation for any damages accruing for the overflowing of any of the lands involved herein on account of the construction and maintenance of dams for the purpose of creating reservoirs in aid of navigation may be very briefly set before the Court. The first item is this: Chapter 24 of Session 2 of the Fiftieth Congress, approved January 14, 1889, and contained in Twenty-five Statutes, six hundred forty-two, which was entitled an Act for the relief and civilization of the Chippewa Indians in Minnesota—I shall not read it all to the Court. It authorized the President to appoint three Commissioners to proceed to Minnesota and negotiate for cessions of all the Chippewa land in the State of Minnesota. Provision was made with reference to a survey of certain lands, and it was provided in section six of the Act, that the Agricultural lands shall be disposed of by the United States to actual settlers only under the provisions of the homestead law. Pursuant to the Act of January 14, 1889, the President appointed commissioners to negotiate with the Indians for the cession of the lands, and that Commission was headed by Henry M. Rice, and was known as the Rice Commission. The Commission made a report, which is contained in House of Representatives Document Number 247, of which we have a certified copy, and which now, for the purpose of this objection and demurrer, I should like to have marked as an exhibit.

186 (Government's Exhibits 9 and 10 marked for identification by the Reporter.)

Mr. Harries: The treaty, which was then made, is comparatively short and perhaps I can read that to the Court.

"The boundaries of the diminished reservation, from which allotments to the Red Lake Chippewa are to be made, are as follows:

"Commencing at Thief River at a point on the dividing line between Marshall and Polk Counties, as designated on a map published by Rand, McNally & Co., of Chicago, in 1888; thence easterly to a point on the northwesterly shore of Upper Red Lake; thence along the northern shore of said Lake to a point due north of a point 1 mile due east from eastern end of the Lower Red Lake; thence southwesterly to a point on Hay Creek 1 mile from its mouth; thence due south

to a point due east of a due westerly line which when extended will run between what is known as the most southerly sugar-bush on Red Lake road to White Earth, and north of what is called the "Big Marsh" to Clearwater River (said line being about 6 miles south of Red Lake); thence down Clearwater River to the southwesterly reservation line; thence along said line to the place of beginning (excepting the right to use in common all the water-ways within the above described limits)".

The agreement is contained in the report, at pages 27 and 28, in House of Representatives Document Number 247. I will also read that to the Court.

"Signature Rolls Red Lake Bands of Chippewa Indians, Minnesota.

"We, the undersigned, being male adult Indians over eighteen years of age, of the tribes or bands of Chippewa Indians occupying and belonging to the Red Lake Reservation, in the State of Minnesota, do hereby certify and declare that we have heard, read, interpreted, and thoroughly explained to our understanding, the act of Congress, approved January 14, 1889, entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota' (Public No. 13), which said act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof,
187 and do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of said Red Lake Reservation as is not embraced in the following described boundaries, to-wit:

"Commencing at the point on Thief River where the same crosses the line between Marshall and Polk Counties, thence easterly to the most northwesterly point of the upper Red Lake, thence easterly along the northerly shore of said upper Red Lake to upper Red Lake, thence easterly along the northerly shore of said upper Red Lake to a point due north of a point 1 mile east from the easterly end of the lower Red Lake, thence due south to the last-named point, thence southwesterly in a straight line to a point on Hay Creek, 1 mile from where said creek enters the lower Red Lake, thence south to a point from which a line extending west passes midway between what is called the 'big marsh' and the sugar

bush north of and nearest to said marsh, said sugar bush being on the Red Lake and White Earth Road; thence west along said line between said marsh and sugar bush to Clear Water River, said line being supposed to be about 6 miles south of the lower Red Lake; thence northwesterly along said Clear Water River to a point where said river crosses the boundary of Red Lake Reservation as the same has heretofore existed, thence along said reservation line to the place of beginning, as designated on a map published in 1888 by Rand, McNally & Co., of Chicago, Ill. (but all waterways within the reservation above described are to be free for commercial purposes to all citizens of the United States), for the purposes and upon the terms stated in said act, which said lands embraced within the foregoing boundaries have been reserved by the commissioners appointed under said act and as therein authorized for the purpose of making and filing the allotments therein provided for.

Witness our hands and seals hereto subscribed and affixed at the Old Red Lake Agency, on the Red Lake Reservation, in the State of Minnesota, this 8th day of July, 1889.

HENRY M. RICE (Seal)
JOSEPH B. WHITING (Seal)
Commission.

B. P. SHULER,
United States Indian Agent.

W. C. HUBBELL,
Secretary to Commission."
and Signatures of Indians.

188 The third item in connection with this objection and demurrer is the eighteenth annual report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institute. It is an official document of the Department of the Interior. We have here a certified copy, which I should like to have marked as Government's Exhibit 11.

(Government's Exhibit 11 marked for identification by the reporter).

Mr. Harries: The Attorney General's Office telegraphed me that the eighteenth annual report to which I have referred is out of print, and that there were no additional copies which could be certified and sent forward. Accordingly, a request was made for photostatic copies of the portions which are here relevant, and I will hand this to the Court, but I also

have a copy of the report itself, which is an official Government publication and taken from the Public Library in Duluth.

(Government's Exhibit 11 read and explained to the Court by Mr. Harries.)

(Government's Exhibits 12 to 20 inclusive marked for identification by the reporter.)

Mr. Harries: Government's Exhibits 12 to 17 inclusive are certified copies of application for homestead entry, and the Court will note that they are all stamped on the margin "Chippewa Lands, Act of January 14, 1889. Subject to Act of May 20, 1908." I particularly refer to the statement "Chippewa Lands, Act of January 14, 1889." The attention of the Court is also directed to the exhibits of the Government, Government's Exhibits 18, 19 and 20, being certificates of the register of the general land office at Cass Lake, Minnesota, which are offered in evidence pursuant to Section 9891 Mason's Minnesota Code. I will read to the Court what these show.

(Government's Exhibits 18, 19 and 20 read and explained to the Court by Mr. Harries.)

(Government's Exhibit 21 marked for identification by the reporter.)

189 Mr. Harries: One more item of evidence in this connection is contained in Government's Exhibit 21, certified copies of maps contained in the annual report of the Commissioner of Indian Affairs to the Secretary of the Interior, for the fiscal years ended June 30, 1888, 1889, 1890 and 1891. The purpose of this exhibit is to tie in the Act of January 14, 1889 provision with the treaty of July 8, 1889, by which the cession was made, by showing to the Court what those reservations were, at the dates named. The Court will note that the reservation embraces the Northwest Angle, and comes down to the south, considerably below Red Lake. Subsequent to that, and as the result of the treaty, these lands passed out of the reservation and became the property of the United States.

Having shown, then, that the tracts involved in the instant proceedings were acquired by the United States under the Act of January 14, 1889, and were embraced in the cession which the Red Lake Bank of Chippewa Indians made to the United States at that time, we come now to the significant

Act of Congress bearing upon these lands. There are two Acts to be considered. The first as an Act of June 7, 1897. It was passed by the Fifty-fifth Congress at its first session, and it is designated as Chapter Three of that session. It is contained in thirty statutes at page 67.

Fifty-fifth Congress. Sess. I.

30 Statutes 62-67

Chapter 3—An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

* *

190 For completing the necessary surveys within the Chippewa Indian Reservation in Minnesota, including expenses of examining and appraising pine lands, under the provisions of the Act approved January fourteenth, eighteen hundred and eighty-nine, to be reimbursed to the United States out of proceeds of the sale of their lands, fifty thousand dollars: Provided, That all lands acquired and sold by the United States under the "Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, shall be subject to the rights of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, and no claim or right of compensation shall accrue from the overflowing of said lands on account of the construction and maintenance of such dams or reservoirs. And the Secretary of War shall furnish the Commissioner of the General Land Office a list of such lands, with the particular tracts appropriately described, and in the disposal of each and every one of said tracts, whether by sale, by allotment in severalty to individual Indians, or otherwise, under said Act, the provisions of this paragraph shall enter into and form a part of the contract of purchase or transfer of title.

Fifty-fifth Congress. Sess. II.

July 1, 1898.

Chapter 545—An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes

for the fiscal year ending June thirtieth, eighteen Hundred and ninety-nine, and for other purposes.

30 Statutes, 571-676.

* * *

191 For completing the necessary surveys within the Chippewa Indian Reservation in Minnesota, including expenses of examining and appraising pine lands, under the provisions of the Act approved January fourteenth, eighteen hundred and eighty-nine, to be reimbursed to the United States out of proceeds of the sale of their lands, fifty thousand dollars; Provided, That all lands heretofore or hereafter acquired and sold by the United States under the "Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, shall be subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, and no claim or right of compensation shall accrue from the overflowing of said lands on account of the construction and maintenance of such dams or reservoirs. And the Secretary of War shall furnish the Commisioner of the General Land Office a list of such lands, with the particular tracts appropriately described, and in the disposal of each and every one of said tracts, whether by sale, by allotment in severalty to individual Indians, or otherwise, under said Act, the provisions of this paragraph shall enter into and form a part of the contract of purchase or transfer of title.

192 The Court: I think it is very likely that this is the first time that attention has been called to this situation. I think it is a very close question in view of these statutes, as to whether these property owners have a right to demand compensation from the United States Government for the construction of any dam built either in whole or in part by the United States Government at the outlet of the Lake of the Woods. In other words, according to the statutes, they took their title subject to this condition, that they were not entitled to any compensation for the flowage of their land as the result of the building of a dam by the United States in aid of navigation, but, of course, it is true in this case—we can't say positively, of course, but apparently those who made this treaty, and apparently Congress in going ahead with this matter assumed at any rate that there would have to be some compensation paid to these people. Now, about the only argument that could be made against this argument is that possibly Congress had in mind that it was only

for such dams as should be solely in the aid of navigation, that those who obtained the lands should be entitled to no compensation for. Then, of course, it could also be argued that taking the treaty and the subsequent Acts of Congress into consideration, that it indicated an attempt on the part of Congress to disregard these provisions and give to these people who acquired these lands, damages regardless of the fact that under their homestead entries they were not entitled to any. I am not at all sure that the objection could not very well be sustained in this case, but we have gone ahead so far upon the theory that the owners of the lands were entitled to be paid their damages for the taking of these easements. If I should sustain the objection now, that disposes of all of these cases, and if the Circuit Court of Appeals should subsequently hold that the objection should not have been sustained, then we will have to go through the whole thing again, and I think probably the practical way to handle the matter is to get all of the questions we can into this one lawsuit, so that an appeal will settle everything that can be settled, and for that reason, and in view of the fact that I am not entirely clear that the objection should be sustained, I think I will overrule it at this time, and allow the Government an exception, and then tomorrow we will proceed.

Mr. Harries: We have an exception, of course, to the ruling?

The Court: The record will show an exception, and also that all of these exhibits which you have presented have been received in support of this objection which has been made. We will recess until tomorrow morning at ten o'clock.

* * * *

193 Thereupon, as additional foundation for the objection of the Government to evidence of the reservoir value of respondent-appellants' lands,

EDWIN E. CORRY,

A witness previously sworn, recalled by the Government for further direct examination, testified as follows:

Direct Examination:

By Mr. Harries:

Q. You have testified that it was part of your official duties as senior engineer of the United States War Department, to procure for the United States the flowage rights contemplated by the Treaty of 1925? A. Yes, sir.

Q. In carrying out those duties what, if any, difficulties did you encounter?

A. We found a lot of difficulties because of the fact that there were encumbrances, mortgages, taxes, ditch liens and things of that sort pending against these lands.

Q. Did you at the outset go into the market and endeavor to acquire the rights contemplated by the Treaty?

A. Yes, sir.

Q. And were conveyances made to the Government of such rights?

Mr. Lewis: Objected to as incompetent, irrelevant and immaterial.

The Court: Well, what is the purpose of the inquiry, Mr. Harries?

Mr. Harries: To show that some trading has gone forward in these particular rights, and acquisitions have been made.

The Court: He may answer.

Mr. Lewis: Exception.

A. Yes, we did make some deals, and secured some easements by direct negotiations.

Q. Why was that not continued?

A. Because of these difficulties principally, that I have just indicated.

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194 ADOLPH F. MEYER, a witness previously called and sworn, recalled on behalf of the Government, testified as follows:

Direct Examination.

By Mr. Harries:

I was the American representative employed as consulting engineer to the International Joint Commission in connection with the reference of the Lake of the Woods matter. In the discharge of my duties I investigated this matter for a period of approximately five years, employing a considerable force of assistants both in the office and in the field, and devoting an average of fifteen to twenty days time personally during some months, and during others my entire time to this work.

Q. What was the chief question that was the subject of your investigation?

A. The question of the official reference submitted to the question with respect to the most advantageous use of the waters of the lake, and the waters flowing into and from the

lake, and the shores and harbors of the lake. Perhaps a statement of the question itself, as referred to the Commission, is the best summary that I could make as to what the problem was.

Q. You may state what that is?

A. Would you like me to read the reference as to the questions?

Q. Yes.

A. This reference was made in June 1912, and reads as follows, addressed to the International Joint Commission of the United States and Canada: "Sirs: I have the honor to inform you that at the joint request of the Government of the United States and of the Government of the Dominion of Canada, under the provisions of Article IX of the Treaty of January 11, 1909, between the United States and Great Britain, the questions or matters of difference set forth below, which have arisen between them involving the rights, obligations, or interests of each in relation to the other, or to the inhabitants of the other, along their common fron-
195 tier between the United States and the Dominion of Canada, are hereby referred to the International Joint Commission for examination and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate.

The questions so referred are as follows:

1. In order to secure the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from that Lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, and for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbors of the Lake and of the waters flowing into and from the Lake, is it practicable and desirable to maintain the surface of the Lake during the different seasons of the year at a certain stated level, and if so, at what level?

2. If a certain stated level is recommended in answer to Question 1, and if such level is higher than the normal or natural level of the Lake, to what extent, if at all, would the Lake, when maintained at such level, overflow the low lands upon its southern border, or elsewhere on its border, and what is the value of the lands which would be submerged?

3. In what way or manner, including the construction and operation of dams or other works at the outlets and inlets of

the Lake, or in the waters which are directly or indirectly tributary to the Lake or otherwise is it possible and advisable to regulate the volume, use and outflow of the waters of the Lake so as to maintain the level recommended in answer to Question 1, and by what means or arrangements can the proper construction and operation of regulating works, or a system or method of regulation be best secured and maintained in order to insure the adequate protection and development of all the interests involved on both sides of the boundary, with the least possible damage to all rights and interests, both public and private, which may be affected by maintaining the proposed level?

196 I have the honor to add that the Government of the United States will be glad to assist the Commission in obtaining any information which it may desire in the course of its investigation of the matters herein referred for its examination and report.

I am, Sirs,

Your obedient servant,

(Sg) P. C. KNOX."

A similar letter was sent by the Canadian Government to the Canadian section of the International Joint Commission.

Q. What interests did you find to be involved in a determination of this question?

Mr. Lewis: Is that material, if the Court please? Aren't we getting a long ways from the subject here?

The Court: He may answer.

Mr. Lewis: Exception.

A. We found first of all, in the order in which they were discussed in the report, the riparian land, the navigation and lumber interests, the use of the waters of the lake for domestic purposes and sanitary purposes, and the use for waterpower development at the outlets. And the navigation and power interests on the lower Rainy, the portion that is affected by the level of the Lake of the Woods, and the waterpower interests on the Winnipeg River, that is, on the river below the outlets.

Q. Did your investigation and the recommendation that you made pursuant thereto have in view the benefit of any particular interest, or how did you arrive at the conclusion you reached?

A. We considered what levels or forms of regulation would be the most advantageous to each particular interest,

and then weighed the advantages and the disadvantages of the different kinds of regulation to all of the interests, and tried to arrive at the level and the type of regulation which would result in the greatest aggregate benefit to all of the interests concerned.

Q. Now, briefly, Mr. Meyer, state what you found to be the interests of navigation and lumbering in the use of the waters of the lake?

197 Mr. Lewis: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Lewis: Exception.

A. The navigation and lumbering interests desired a fairly uniform level, that is, extreme low levels resulted in too shallow water in navigation channels, and it prevented the bringing of the logs from the outlets through the channels and up to the jack ladders, where they were taken up into the sawmills.

Q. A jack ladder is a device for lifting the logs out of the water and into the mill? A. Yes, sir.

Q. And with reference to the navigation interests, aside from what you have just said, is there anything further that you can state at this time?

A. The officer in charge of the district under which the improvements were made on the United States side, at Warroad and at Zippel, on the south shore, stated that at stages below 1058 it would be necessary to dredge those channels deeper, because they had been built originally on the assumption that a higher level would prevail.

Q. What did you learn as to the interests of fishing, Mr. Meyer?

A. The fishing interests also desired a fairly uniform level, and on the south shore particularly, not too high a level, because at the high levels the muskeg or peat is broken up by the waves, and it floats out into the lake, making the water dark, and undesirable from a fisherman's viewpoint.

Q. Tell us, if you know, whether the lake level has any effect on the spawning of fish?

A. The more uniform the level, the better for the spawning grounds.

Q. Are the interests to which you have referred, namely, navigation, lumbering and fishing, considerable on the lake?

A. The fishing interests are quite important. There was relatively little navigation by deep draft boats, but a good deal of navigation by shallow draft boats at the outlets. One

large boat had been used until about that time, but I
198 think that that was discontinued just about during those years of our investigation. There were some tugs used in connection with fishing operations that required a draft of four to five feet, as I recall it. The one large boat, I think, that operated for a number of years, from Kenora, required, I think, eight or ten feet. That was the only large boat that was in operation on the lake. There was quite extensive fishing, and the lumbering interests were not so extensive, and were becoming less and less important.

Q. Did you find, Mr. Meyer, that the interests of navigation required a higher level or a lower level than domestic and sanitary purposes?

A. The interests of navigation, to be best served, required a higher level.

Q. Would it be accurate to say that your official duty called for a reconciliation of the various interests, and a determination of the maximum aggregate benefits to be secured for all, taken together?

A. Yes, that was the question as we viewed it.

[A.] The outlets of the Lake of the Woods are at the point to which I am now pointing, the extreme northern end of the Lake. There are two principal natural outlets, one very much larger than the other, and a third natural high-water outlet at the west end of the bay, several miles to the west of the two principal outlets, and in addition there are two artificial outlets that have been cut through the ridge of rock that divides the Winnipeg River from the Lake of the Woods. There is a bay on the lower side, extending for several miles quite close to the lake itself, so that it was possible to cut channels through this ridge. These two outlets are now in use by the Lake of the Woods Milling Company. The high-water outlet was originally in use by the Keewatin Lumber Company, but has not been used for some time since. The eastern outlet was the first outlet of the two main natural outlets from which power was developed.

Q. Will you point to about where that eastern outlet is?

A. Unfortunately the map is not drawn on a sufficiently large scale in order to differentiate between
199 the several outlets.

Q. I wonder if you happen to have in your bag there a map that will show the country at the outlet?

Mr. Harries: I think there is another map that was introduced that would show it, Mr. Lewis.

Q. (continued) If that does not show it satisfactorily, if you have one of your own, we will produce that, Mr. Meyer.

Mr. Harries: Well, there is a detailed map there that will show that.

A. The Lake of the Woods is shown in the lower portion of this detailed map, and the Winnipeg River in the extreme upper portion. There are a number of islands and a number of channels as the map shows. The one fartherest east is the eastern outlet, in which is shown the Kenora Power Company. The western outlet is shown next. The water of course is flowing north, and then in a westerly direction, into the same bay or expanse of the Winnipeg River immediately below the Lake of the Woods. Toward the extreme left are the Canadian outlets. The two artificial channels are shown first, black marks being drawn across the channels to represent Mills A and C of the Lake of the Woods Milling Company. At the extreme western end of that bay there is the high-water outlet, which is now closed off, and which at present on this map shows no connection with the lower river. This was in use back in the early years, by the Keewatin Lumber Company.

Q. All right. Perhaps that gives us a picture of it. You may take the chair again. As I understand you then, there are all together five outlets counting the artificial ones?

A. Yes, sir.

Q. Five outlets to the lake? A. Yes, sir.

Q. How many dams are there?

A. There are two principal dams in the two main outlets, and an old structure across the high-water outlet, but that is a very minor structure. Then the mills themselves, that is, the hydraulic plans, in which the power is developed, constitutes the dam on the two artificial outlets. There is no other dam required in those outlets.

200 Q. When were those dams built?

A. The present Norman Dam in the western outlet, which is the principal outlet, was built in 1893 to 1895, but the stop-logs were not put in until 1898 in November. The dam consists of just a series of sluices, for discharging the water, and originally a rock fill which was later in 1925 replaced by a power house for development of power.

Q. While you are right there on that, realizing that perhaps none of us are familiar with the construction of dams, will you tell us what you mean by stop-logs, what their function is, and what the result of their use is?

A. The dam consists of masonry piers with grooves in them, into which large logs are dropped, so as to stop the flow of the water when the logs are in place. The logs are piled one on top of another, put in by machinery and taken out by machinery. They are roughly about eighteen inches

thick at the bottom, to withstand the pressure of the water, and they are not quite so heavy at the top. The stop-logs are taken out when it is desired to waste any water through the dam. As long as the water is being used for power development, it merely flows through the water wheels in the other portion of the dam. The eastern outlet is closed practically entirely by the power plant. The water that flows through there is all used for power purposes.

Q. As I understand you then, Mr. Meyer, the purpose of installing these stop-logs is for the generation of power? That is the way power is generated?

A. The purpose of the stop-logs, perhaps, better, is to hold the water back, so that it can flow through the water wheels and form the development of power, and the stop-logs are only taken out in time of flood, when it is necessary to waste water. The stop-logs are part of the dam, and are merely taken out when it is necessary to waste water. They form part of the barrier which holds the water back, so that it may be used for power development.

201 Q. In other words, you have piers built up something like these books, here? A. Yes, sir.

Q. And the logs are put in this way, into these grooves, and the water is back here, and it backs up here, and when you want to raise the water a little higher, you put in another stop-log? A. Yes, sir.

Q. And as you raise these stop-logs, that backs the water up, does it not? A. Holds it back, yes.

Q. And the higher the water is raised here at the dam, the more country overflows back of the dam? A. Yes.

Q. Now, you say that the dam, that is, the Norman Dam, was completed in 1895, did you say?

A. It was completed between 1893 and 1895, but the stop-logs were not put in until November, 1898.

Q. To what extent were the stop-logs put in then, that is, to what height, did they start raising the water in 1898?

A. The intention was to raise the water, or to hold the water at the ordinary summer level.

Q. What contour would that be, or what sea level datum?

A. The actual level to which the water was raised varied, of course, throughout the year, as the records of the Commission clearly show. The average raise in the water level was somewhere near three feet.

Q. Do you recall, now, Mr. Meyer, without referring to data, what the level was, the high level at which the water was maintained?

A. It varied, of course, through the year, so that there was no one level at which it was continually maintained, but somewhere in the neighborhood of 1060.5.

Q. What I am really getting at is whether ever since 1898 the water of the Lake of the Woods has been controlled in substantially the same way as it is being controlled now?

202 A. Yes, in a general way it has been since that time, controlled and raised to approximately the same extent as it is raised at the present time.

Q. So, as I understand you, the lands we are interested in here as belonging to these three respondents, as well as all the other lands indicated on the maps which are introduced here, have been flooded through all these years from 1898, to substantially the same extent that they have been flooded in recent years, and at the present time?

A. Yes, sir.

Q. There has been no substantial change in that regard?

A. No, sir.

* * * * * *

Q. What were those dams put in for, and what power was being generated, and what about the interests of navigation? We might as well go into that.

A. The first dam, which I have not mentioned before, that was built in the lake, was put in in 1887, in this same outlet, the western outlet, in which the Norman Dam was later built. That dam was a fixed dam, a timber cribbed dam, built in an entirely different way. It was farther up, you might say almost in the lake, where a long dam could be put in, which would raise the low water considerably, for the improvement of navigation, but which would not raise the high water very much. That dam functioned until the stop-logs were put into the Norman Dam in the winter of 1898-1899, and in 1899 the old rollerway dam, as it was known, was blasted out.

Q. The rollerway dam was this old fixed dam, you told us about a moment ago?

A. Yes, and that was put in, in aid of navigation. The Ontario government made an agreement with the owners of the Norman Dam, namely, the Canadian Power Company, on the right to control that dam, to put in the stop-logs and take them out as they saw fit, to keep up the level in the interests of navigation, and for the saw mills and flour mills at

203 the outlet of the lake. The agreement also stated that if at any time the Power Company wanted to use the dam for power purposes, that they could give notice to terminate the agreement.

Q. At that time, Mr. Meyer, were there any considerable number of power plants built on farther down the river, or

was the power that was generated at that time, as early as 1898, practically all generated at the outlet of the lake?

A. As I recall it, there were no power plants in the river, below at that time.

Q. Now, will you very briefly, sketch for the Court and Jury, please, the development of these water-power projects down the course of the Winnipeg River, and tell us a little bit about them as you go along, so we will know a little about the magnitude of the possibilities there?

A. Right at the outlet there is a fall of about twenty feet, and in the river below there is a total fall of about two hundred and ninety feet that can be used for power development. The first main power is at White Dog Rapids, where there is about forty-five feet of fall. That has not been developed. Then there are additional natural falls in the river between there and Lake Winnipeg, varying in height, at which power has been developed, and other sites which are still undeveloped.

At this point government counsel asked leave to interrupt for the purpose of making an objection to the introduction of any evidence and interposing a demurrer to evidence in support of any claim for compensation for damages accruing from the overflow of any of the lands involved herein on account of the construction and maintenance of dams for the purpose of creating reservoirs in aid of navigation; and cited the Indian treaties and the laws supporting the Government's position, as more fully shown at pp. 9-16, inclusive, herein.

After hearing argument, the Court overruled the objection and demurrer (the ruling appearing verbatim p. 16 herein), and

204 ADOLPH F. MEYER, a witness previously called on behalf of respondents, having been previously sworn, continuing.

By Mr. Lewis:

Q. Can you give us first then the area, the surface area of the Lake of the Woods?

A. The water area is 1485 square miles at an average level of about 1059 to 1060.

Q. For our convenience in comprehending this matter of acreage, Mr. Meyers, could you not give us the totals in the two countries bordering on the lake?

A. The total area in the United States and Canada between the old meander shore line and contour 1064 is 78,081 acres—those were the lands that, in our judgment, were af-

fected by the proposed reservoir and had been affected by the past reservoir use of the lake.

Q. Well, that is, the regimen of levels provided by the treaty contemplated the same effect of all lands between the old meander line and contour 1064, is that right?

A. Yes, sir.

Q. Won't you explain for us, Mr. Meyer, where the waters were designed to stand, according to the treaty?

A. The ordinary maximum level was specified at 1061.25. Whenever the water was below 1061, the control of the outlet was to be entirely in the hands of Canada. And when it raised above 1061 the outflow was to be controlled by a joint board, consisting of representatives of both the United States and Canada.

With the waters in a state of nature the level of the lake would have reached above elevation 1061 only once in a period of thirty years.

Q. Now under a state of control as contemplated by the treaty and having in mind, as I am sure you have, the requirements of power and other interests, for how much of the time do you estimate that the level of the lake will be maintained at or above 1061, with the lake under a state of control?

205 A. In my judgment the mean monthly level of 1061½ will probably be reached or exceeded under control, as provided by the treaty of 1925, on an average of once every five years.

Q. And what is your estimate, Mr. Meyer, of the average level at which the water in the lake will be maintained under a state of control, having in mind the requirements of power and other interests that will be interested in keeping the waters of the lake as high as permissible?

A. In my judgment the average level will be between 1060½ and 1061—I would say 1060½. I have not made an exact computation of that, but that is my best judgment at this time. I might add to that answer that I gave you a moment ago that while the ordinary maximum is at 1061.25, under the treaty the average level will probably be in the neighborhood of 1060.

Q. Do you care to explain that so we will know what you have in mind—how you compute that?

A. The treaty provided for an ordinary maximum of 1061.25, and that between 1056 and 1061 the outflow shall be

regulated so as to maintain the highest possible dependable outflow. That means that the reservoir will be kept filled as much as possible, and will be drawn down only as required to supply this dependable flow; so that the reservoir does not need to be partially empty in the springtime to provide for inflow; although there is of course provision under the treaty undoubtedly for the regulating Board to do so, if they feel it necessary to do so in order to prevent higher levels than the 1062.5.

The Keewatin Power Company owns the cribwork that closes the westernmost outlet, and either the Keewatin Power Company or its subsidiary now controls the structures in the eastern outlet, but the dam itself, in the western outlet, is under Government control.

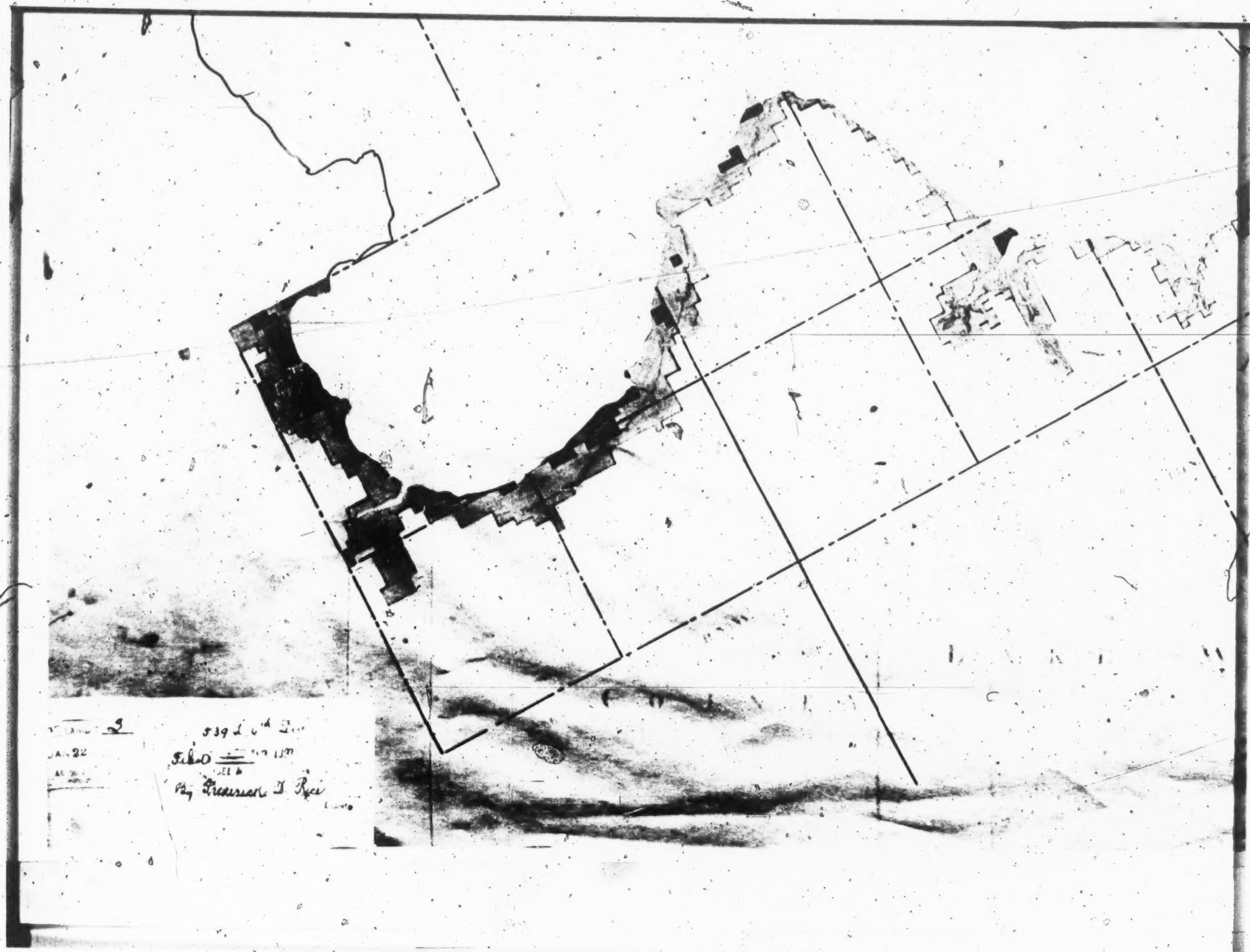
Q. Which Government?
A. The Canadian Government, between the levels of 1056 and 1061.

206 After submission of respondent's offers to prove, the following proceedings were had.

The Court: What I am getting at is this: you do not claim that any of this evidence contained in these offers goes to the question of any other values of these lands which are to be submitted to the jury; in other words, you do not claim that by sustaining the objection of the Government, that I am preventing you from putting in evidence all that you would like to have before the jury in determining the value of these lands exclusive of their reservoir value?

Mr. Lewis: That is right. The facts which are offered to be proved do not bear upon the question of any other value except the value of the flowage easements and the reservoir value of the property.

The Court: All right.



Filed
By Treasurer D Rice

LANDS IN AFFECTED EASEMENT ZONE
WHOLLY OR IN PART BELOW ELEVATION 1064

--UNITED STATES LANDS AS OF JAN. 1-1931.

--TRACTS IN HOMESTEAD ENTRY AS OF JAN. 1-1931.

--LANDS IN PRIVATE OWNERSHIP AS OF JAN. 1-1931.

--STATE LANDS

LAKE WOODS [illegible] RESERVOIR

NORTHEASTERLY PART LONG SAULT PA[illegible]

Approximate land subdivisions & the 1064 contour

207 (Petitioner's Exhibit 3, Map Showing Lands Bordering on Lake of the Woods.)

SCHEDULE OF INDIAN

Date	Where or how concluded	Reference	Tribe	Description of cession or reservation
1889 Mar. 2	Act of Congress.	Stat. L., XXV, 888.	Lower Brulé Sioux.	For the Indians receiving rations and annuities at the Lower Brulé agency, the lands bounded as follows: Beginning on the Missouri river at Old Fort George; thence running due W. to the western boundary of Fresho county; thence running S. on said western boundary to the forty-fourth degree of latitude; thence on said forty-fourth degree of latitude to western boundary of T. 72; thence S. on said township western line to an intersecting line running due W. from Fort Lookout; thence eastwardly on said line to the center of the main channel of the Missouri river at Fort Lookout; thence N. in the center of the main channel of the said river to the original starting point.
			Crow Creek Sioux.	For the Indians receiving rations and annuities at Crow Creek agency, the following lands: The whole of T. 106, R. 70; T. 107, R. 71; T. 108, R. 71; T. 108, R. 72; T. 109, R. 72, and the S. half of T. 109, R. 71; and all, except secs. 1, 2, 3, 4, 9, 10, 11, and 12 of T. 107, R. 70, and such parts as lie on the E. or left bank of the Missouri river, of the following townships, namely: T. 106, R. 71; T. 107, R. 72; T. 108, R. 73; T. 108, R. 74; T. 108, R. 75; T. 108, R. 76; T. 109, R. 76; T. 109, R. 74; S. half of T. 109, R. 75; and T. 107, R. 73; also the W. half of T. 106, R. 69, and secs. 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33 of T. 107, R. 69.
May 6	Executive order.	.....	Mission Indians.	The President orders certain lands to be withdrawn from sale and set apart as a reserve for the Mission Indians, as follows: T. 10 S., R. 4 E., and secs. 3 and 4, T. 11 S., R. 4 E. of the San Bernardino meridian, except so much of the same as is covered by the patents issued to J. J. Warner, Jan. 16, 1880, and to Harmon T. Helm, Jan. 16, 1886, are hereby withdrawn from sale and settlement, and set apart as a reservation for the Mission Indians: Provided, however, that any other tract or tracts the title of which has passed out of the U. S., or to which valid, legal rights have attached under existing laws of the U. S. providing for the disposition of the public domain, are also hereby excepted and excluded from the reservation hereby created.
July 8 to Nov. 21	Agreement...	H. R. Ex. Doc. 247, 51st Cong., 1st sess.	Chippewa of Minnesota.	By agreement various bands of these Indians respectively cede, as specified below, their title to the sundry tracts designated.
			Red Lake Chippewa (1).	Cede to the U. S. all their title and interest in so much of the Red Lake reservation as is not embraced in the following boundaries: Commencing at the point on Thief river where the same crosses the line between Marshall and Polk counties; thence easterly to the most northwesterly point of the upper Red lake; thence easterly along the northerly shore of said upper Red lake to a point due N. of a point 1 mile E. from the easterly end of the lower Red lake; thence due S. to the the last named point; thence southwesterly in a straight line to a point on Hay creek 1 mile from where said creek enters the lower Red lake; thence S. to a point from which a line extending W. passes midway between what is called the "Big marsh" and the sugar bush N. of, and nearest to, said marsh, said sugar bush being on the Red Lake and White Earth road; thence W. along said line between said marsh and sugar bush to Clear Water river, said line being supposed to be about 6 miles S. of the lower Red lake; thence northwesterly along said Clear Water river to the point where said river crosses the boundary of Red Lake reservation as the same has heretofore existed; thence along said reservation line to the place of beginning, as designated on a map published in 1898 by Rand, McNally & Co., of Chicago, Illinois. (Signed July 8, 1889.)

LAND CESSIONS—Continued.

Historical data and remarks
By the act of Jan. 14, 1889, the President was authorized to appoint within sixty days thereafter, three commissioners to negotiate with the various bands of Minnesota Chippewa for the cession of all their lands in Minnesota, except the White Earth and Red Lake reservations, and such of these as were not required to fill allotments to the Indians. The negotiations were not all made on the same day, however. As they are all the result and parts of one transaction, they are all brought together here under a general heading.
The ceded portion is shown in the blue plat.....
The restricted reservation is the green plat.....

SCHEDULE OF INDIAN

ibe	Description of cession or reservation
Brulé	For the Indians receiving rations and annuities at the Lower Brule agency, the lands bounded as follows: Beginning on the Missouri river at Old Fort George; thence running due W. to the western boundary of Presho county; thence running S. on said western boundary to the forty-fourth degree of latitude; thence on said forty-fourth degree of latitude to western boundary of T. 72; thence S. on said township western line to an intersecting line running due W. from Fort Lookout; thence eastwardly on said line to the center of the main channel of the Missouri river at Fort Lookout; thence N. in the center of the main channel of the said river to the original starting point.
reek	For the Indians receiving rations and annuities at Crow Creek agency, the following lands: The whole of T. 106, R. 70; T. 107, R. 71; T. 108, R. 71; T. 108, R. 72; T. 109, R. 72, and the S. half of T. 109, R. 71; and all, except secs. 1, 2, 3, 4, 9, 10, 11, and 12 of T. 107, R. 70, and such parts as lie on the E. or left bank of the Missouri river, of the following townships, namely: T. 106, R. 71; T. 107, R. 72; T. 108, R. 73; T. 108, R. 74; T. 108, R. 75; T. 108, R. 76; T. 109, R. 73; T. 109, R. 74; S. half of T. 109, R. 75; and T. 107, R. 73; also the W. half of T. 106, R. 69, and secs. 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33 of T. 107, R. 69.
Indi-	The President orders certain lands to be withdrawn from sale and set apart as a reserve for the Mission Indians, as follows: T. 10 S., R. 4 E.; and secs. 3 and 4 T. 11 S., R. 4 E. of the San Bernardino meridian, except so much of the same as is covered by the patents issued to J. J. Warner, Jan. 16, 1880, and to Harmon T. Helm, Jan. 16, 1880, are hereby withdrawn from sale and settlement, and set apart as a reservation for the Mission Indians: Provided, however, that any other tract or tracts the title of which has passed out of the U. S., or to which valid, legal rights have attached under existing laws of the U. S. providing for the disposition of the public domain, are also hereby excepted and excluded from the reservation hereby created.
a of ota.	By agreement various bands of these Indians respectively cede, as specified below, their title to the sundry tracts designated.
Chip- a.	Cede to the U. S. all their title and interest in so much of the Red Lake reservation as is not embraced in the following boundaries: Commencing at the point on Thief river where the same crosses the line between Marshall and Polk counties; thence easterly to the most northwesterly point of the upper Red lake; thence easterly along the northerly shore of said upper Red lake to a point due N. of a point 1 mile E. from the easterly end of the lower Red lake; thence due S. to the the last-named point; thence southwesterly in a straight line to a point on Hay creek 1 mile from where said creek enters the lower Red lake; thence S. to a point from which a line extending W. passes midway between what is called the "Big marsh" and the sugar bush N. of, and nearest to, said marsh, said sugar bush being on the Red Lake and White Earth road; thence W. along said line between said marsh and sugar bush to Clear Water river, said line being supposed to be about 6 miles S. of the lower Red lake; thence northwesterly along said Clear Water river to the point where said river crosses the boundary of Red Lake reservation as the same has heretofore existed; thence along said reservation line to the place of beginning, as designated on a map published in 1888 by Rand, McNally & Co., of Chicago, Illinois. (Signed July 8, 1889.)

LAND CESSIONS—Continued.

Historical data and remarks	Designation of cession on map: Number	Location
	704	Dakota 3.
	705	Dakota 3.
		California.
By the act of Jan. 11, 1889, the President was authorized to appoint, within sixty days thereafter, three commissioners to negotiate with the different bands of Minnesota Chippewa for the cession of all their lands in Minnesota, except the White Earth and Red Lake reservations, and so much of these as were not required to fill allotments to the Indians. The agreements were not all made on the same day, however. As they are all under one act and parts of one transaction, they are all brought together here under one general heading.		
The ceded portion is shown in the blue plat	706	Minnesota (northern portion).
The restricted reservation is the green plat	707	

(Government Exhibit 11.)
(Filed in U. S. District Court on Feb. 13, 1931.)
2008

E-147

1308731
"B"

Rec'd Land Office Dec 22 1930
F. AYER
E. PORTER

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
WASHINGTON

December 16, 1930.

I hereby certify that the annexed copies of papers, filed under Cass Lake [illegible], formerly Crookston 01017, are

539 L. 6th Div
3.

Frederick D. Ryus

true and literal exemplifications of the originals on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

Acting Assistant Commissioner of the General Land Office.

...ary of the Interior December 24, 1919

...RTMENT OF THE INTERIOR

RECEIVED
U. S. LAND OFFICE
CROOKSTON, MINN.
Date MAR 24 1923
Hour _____

...HOMESTEAD ENTRY

...E, CROOKSTON, MINNESOTA

SERIAL NO 018017

APPLICATION.

RECEIPT NO 2548935

...Miss _____ (male), a resident of ...sota, (reside in case of the former) do hereby apply ...ection 2289, Revised Statutes of the United States, the

...NE, NW¼ Sec. 25, and NE SE Section ... 24 T. ___, 5th principal Meridian, containing ...han the Crookston, Minnesota, land district; ... I am not the proprietor of more than 160 ... or Territory; that I _____ have (filed declaration) of intention to become a _____ citizen of the United States, and am single and over twenty-one years of age; that my post-office address is Box 403, Terrace, Minnesota that this application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation or syndicate in making this entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I may acquire from the government of the United States will inure in whole or in part to the benefit of any person except myself. I further swear that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; and that I have not heretofore made any entry under the homestead laws or filed a soldier's or sailor's declaratory statement, ...

5/28/30 Patent Issued

that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined same; that there is not to my knowledge within the limits thereof any vein or lode or quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any ...

Elias A Olsen

Note.—Any person swearing falsely to the above affidavit shall be punished as provided by law for perjury. (See Sec. 125, U. S. Criminal Code, over.)

Posted 5-1-23 in Vol. 47, p. 99, by ..., Div. "Q."

210

Examined and Passed U. S. L. O. MAY 3 1923

169

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified by

before me by .

that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office in Baudette, Beltrami County, Minnesota, within the Crookston, Minnesota land district, this

21st day of March, 19 23.

United States Commissioner, District of Minnesota.

UNITED STATES LAND OFFICE AT CROOKSTON, MINNESOTA

3/31- 1923

I HEREBY CERTIFY that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under Section 2286, Revised Statutes of the United States, that there is no prior valid adverse right to the same, and has this day been allowed.

Martin Widstoe

Register.

2102

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OAK MERCANTILE COMPANY

DEALERS IN
GENERAL MERCHANDISE
FURS, TIMBER AND FISH
OAK ISLAND, MINN.
ON LAKE OF THE WOODS

RECEIVED
LAND OFFICE
KENSTON, MINN.

DATE ——— 1923
HOUR ———

State of Minnesota—
County of Lake of the Woods

Elias Olson being first duly sworn on oath deposes and says; That he could not get lumber on to his claim 1 on account of deep snow & when the snow did go down the ice was unsafe — The muskeg being open and that it is impossible to get in there with a team in the summer and on account of these facts he respectfully requests an extension of time within which time to get in there this winter after the ice has formed and he that he be granted extension of time to December 1st 1923.

Signed Elias Olson

Subscribed & sworn to before me a Justice of the Peace in & for Angle Tp. Lake of the Woods County Minn. this 11th day of Sept. 1923

R. J. Smith
Justice of the Peace

211

178

OAK MERCANTILE COMPANY

GENERAL MERCHANDISE
FURS, TIMBER AND FISH

4/11 - 23

Mr Mather Wedelum
U. S. Land office
Crookston

Dear Sir

Please find enclosed Re affidavit of Elias Lesin requesting Mineral time to [illegible] donated located in N. W. angle. I might say that I personaly know the man and Lair resided here for several years and I fully believe the statements as sworn to by Lesin.

Yours truly
Justice of the Peace
Oak Island
Minn.

RECEIVED
U. S. LAND OFFICE
CROOKSTON, MINN.
Date
Hour

175

(Form approved by the Secretary of the Interior July 16, 1912.)

DEPARTMENT OF THE INTERIOR.

APPLICATION FOR AMENDMENT.

(Section 2372, R. S., amended.)

Conf. 12/0 Y" 254973

U. S. LAND OFFICE ..... No. .....

I, Elias A. Olson of Ord Island now formerly of Warroad Minn. (Give post-office address.)

having made Hd. appl. (Kind of entry, whether original, or additional) No. 018017

for the S.W. ¼ N.W. ¼ sec 25 and S½ N.E. ¼, and N.E. ¼ S.E. ¼

Section 26

Township 168 N., Range 34 W., 5th Principal Meridian, Crookston Minnesota Land District, do hereby apply for amendment thereof in such manner and with such effect as that, when so amended, said entry will include and embrace the following-described lands, and no others, to-wit:

S.W. ¼ N.W. ¼ sec 25

S.E. ¼ N.E. ¼, N.E. ¼ S.E. ¼ sec 26, and fractions lying n ½ n.w ¼ section

Section 25

Township 168 N., Range 34 W., 5th Principal Meridian, and, being first duly sworn, upon oath say: That I originally intended to enter the Fractions Composed of N ½ N.W. ¼ section 2 (Describe lands applied for and found to exist)

in order to get to my land by boat as there is no roads & I found that Alexander Leslie had it so I took what was left

Section

Township 168 N., Range 34 W., 5th Principal Meridian; that as the consequence of mistake and misinformation, said claim was not made to embrace all (or any portion) of the lands so intended to be entered, but, on the contrary, included and embraced lands not selected or intended to be entered by me, and which I do not desire to keep and retain in my said claims; that the error or mistake from which I desire relief, and the reason why I do not desire to maintain and perfect the claim as now made and recorded, will be now stated and explained as follows:

(Set out fully a statement of the cause of the error and of the reason why amendment is necessary or desirable. Applicant should also state when his error or mistake was discovered, and why it was not sooner discovered.)

I thought I still had water front on Rice Land as originaly entered but find that there is not water enough for boats and is too soft and miry to go even on foot as there has never been anything done on the Alexander Leslie entry I Consider it only fair to ask for a Change which will enable me to live there and perfect my entry, as I cannot possibly get to my land without I get those fractions & there only by boat

Vol 49 42 42 2126

as the Condition is at present I cannot get to my land either by boat or overland

I do further declare that I am well acquainted with the character of the land now applied for, and every portion thereof, and from my personal knowledge I swear that there is not within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or any deposit of coal; nor within the limits of said lands any placer, cement, gravel, or other valuable mineral deposits; nor is there any salt spring or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land; and that my application therefor is not for the purpose of fraudulently obtaining title to mineral land; that the land applied for is not occupied nor claimed by any adverse claimant.

The character of the land applied for is as follows:

(Describe the character of the land by legal subdivisions, and state amount and kind of timber on each subdivision, if any. If the application pertains to an entry under the enlarged homestead law, it should be shown whether any of the land contains merchantable timber, and whether any portion is susceptible of irrigation at a reasonable cost from any known source of water supply.)

all the land is but little higher than it is of late and has no salable timber it is covered with willows and small poplar — an excellent meadow when clear

Applicant further avers that the lands embraced in his entry, as now existing and of record, are in the same state and condition as when entry was made by him, no timber or other thing of value having been removed therefrom by applicant, or by any other person, by his procurement, or with his consent and acquiescence; that I have not sold, assigned, transferred, or relinquished said land, or any portion thereof, or obligated myself to do so.

Elias A. Olson

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. See section 125, United States Criminal Code (over).

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known ~~(or has been satisfactorily identified before me by _____)~~;

(Give full name and post-office address.)

that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in Oak Island P.O. (Town.)

Located Red Woods County Minnesota, within the _____ (County and State.)

Crookston, Minnesota Land District, this 27th day of September, 1924.

P S Smith

(Official designation of officer.)

(Seal) P. S. SMITH, Notary Public, [illegible] Red Woods County, Minn. My commission expires December 18th, 1928.

429

1-54

CORROBORATING AFFIDAVITS.

AFFIDAVIT OF WITNESS AS TO FACTS.

I, Oscliff Hansen (Given and Christian names), whose post-office address is Oak Island (Post-office) Minn., being 27 years of age, and by occupation a Farmer, do solemnly swear that the facts within my personal knowledge relative to the mistake of Elisa a Olson in filing upon the S½ NW¼ NW¼ sec. 26 S½ NE¼, NE¼ SE¼ Section 26 Township 168 N. Range 34 W. 5th Principal Meridian, Cookston Minnesota Land District, the precautions taken to avoid said error, and the grounds on which application for amendment is filed, are as follows:

(If the application pertains to an entry under the enlarged homestead law, the witness should state whether any of the land contains merchantable timber, and whether any portion is susceptible of irrigation at a reasonable cost from any known source of water supply.)

There are no Roads Mr Olson thought he could get to the land by boat. and found he could not do so, by taking those factions he can get a dock in navigable water

My knowledge of the foregoing facts was acquired as follows: Personally acquainted with this district

Oscliff Hansen (Given and Christian names)

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by), and I verily believe affiant to be a credible witness and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office, in Oakland (Town), Lake of the Woods County, State of Minnesota, within the Crookston Minn. and District, this 27th day of September, 1924

P S Smith

(Official designation of officer.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. See section 125, United States Criminal Code (over).

(3)

P S SMITH, Notary Public, [illegible] My commission expires [illegible]

213a

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AFFIDAVIT OF WITNESSES AS TO CHARACTER AND REPUTATION OF APPLICANT

We, Crakeff Hansen (Give full name) of Oak Island Minn (Give full post-office address)
29 years of age, and by occupation Farmer
and Philip Schyler Smith (Give full name) of Oak Island Minn (Give full post-office address)
39 years of age, and by occupation Farmer,
do solemnly swear that we have been well acquainted with the applicant 2 years and 8 years, respectively; that we have read the statements made by him in his said application; that he is a person of truth and veracity, and that we believe said statements to be true.

Crakeff Hansen
(Sign here, with full Christian name.)

Philip Schyler Smith
(Sign here, with full Christian name.)

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known. ~~(or have been satisfactorily identified before me by _____).~~ and I verily believe affiants to be credible witnesses and the identical persons herein before described, and that said affidavit was duly subscribed and sworn to before me, at my office in Oak Island (Town) Lake County, State of Minnesota, within the Crookston Minn. Land District, this 27th day of September, 1924

P. S. Smith

P S SMITH
Notary Public, Lake of the Woods County, Minn.
Official commission expires November 18th, 1930.

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. See section 125, United States Criminal Code (below).

UNITED STATES LAND OFFICE at Crookston, Minn
Oct. 10, 1924

WE HEREBY CERTIFY that the foregoing application is for surveyed land and that there is no prior valid adverse right to the same. We recommend that the application be allowed

Martin Wiltsey
Register.

Receiver.

UNITED STATES CRIMINAL CODE.

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will truthfully, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath, state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

214

183

Serial No. 018017

Withdrawal part of request for amendment- 13967[illegible]

U.S Land office Crookston Minnesota

Elias a Olsen being duly sworn, states that he is the same identical person who on march 31, 19[illegible] made homestead entry, Crookston serial no. 018017, for the S.W. ¼ N.W ¼ sec 25, S.E ¼ N.E ¼, N.E ¼ S.E. ¼, sec 26. T168N, R 34W., of the 5 P.M. and who on oct 3. 1924. filed an application for amendment the said entry so as to include Lot 1 sec 25 and lot 2 sec 25 and to exclude S.W. ¼ N.E ¼ sec 25

The said application having been refused by the Commissioner of the General Land Office in his letter C. of January 23, 1926 which also carries the suggestion that it can be allowed if it is for Lot 2 and excludes lot 1, also - should you desire Lot 1, could get it by making a new application and dropping some of the forties. I hereby repeat my request for Lot 1 sec 25 Lot 2 sec. 25; and in addition include that lot which lies in the N.E. ¼ N.E. ¼ sec 26, and exclude N.E. ¼ S.E ¼ sec. 26, S.W ¼ N.E ¼ sec 25 leaving the entry to include (Lots 1 and 2. sec. 25 and that lot lying in N.E. ¼ N.E. ¼ sec. 26., S.W. ¼ N.W. ¼ sec 25., S.E. ¼ N.E. ¼ sec 26., T168 N., R. 34 W., 5th P.M),

Yours Respectfully

Elias a. Olsen

subscribed and sworn to before me this 19th day of February 1925

O.S. Smith

P S C

Notary Public [illegible] Polk County, Minn. [illegible] October 18th, 1930.

RECEIVED
U. S. LAND OFFICE
CROOKSTON, MINN.
Date FEB 28 1925

214a

185

216 4—621

Department of the Interior
United States Land Office

Oak Island, Minn.
(Place.)

June 4, 1929.
(Date.)

Entry Stamped on Records.
J. R. Waters, Register.

1398731—202
Received
U. S. Land Office
Cass Lake, Minnesota
Date June 8, 1929.
Hour 9 a. m.

Relinquishment of Entire Claim

I hereby relinquish to the United States all my right, title, and interest in and to Entry No. ....., made at .....
(Name Land Office where entry was made)
....., the land being described as follows: ..... Section ....
....., Township ....., Range .....,
..... Meridian.

.....
(Signature)

Witnesses:

.....
(Name and address.)

.....
(Name and address.)

Acknowledged before me this ..... day of ....., 19

.....
.....
(Official designation of officer.)

The relinquishment accompanying a Repayment Application must be executed before the Register or Receiver, or before an officer qualified to take acknowledgments of deeds.

Other relinquishments may be accepted if the signature is attested by two witnesses.

Relinquishments of homestead entries can not be accepted if the entryman be dead unless executed by the statutory successors named in Sec. 2291, R. S. Where no widow survives and the relinquishment is executed by the heir or heirs, a corroborated affidavit must be attached setting forth the names of all the heirs, and their relationship to the entryman.

Relinquishment of Portion of Entry.

I hereby relinquish to the United States all my right, title, and interest in and to the following described land: SW¼ NW¼ Sec. 25, and SE¼ NE¼ Sec. 26, Township 168 N., Range 34 W. 5th Prin. Meridian, being part of the land embraced in Entry No. Crookston 018017, Cass Lake 013608, made at Crookston, Minn.

(Signed) ELIAS ALFRED OLSON.

Acknowledged before me this fourth (4th) day of June, 1929.

(Seal)

(Signed) PHILIP S. SMITH,
U. S. Commissioner.

(Official designation of officer.)

5/28/30 noted in "O" R V L

[redacted] HOM[redacted]RY.

U. S. LAND OFFICE [redacted]

FINAL PROO[redacted]

TESTIMONY OF CLA[redacted]

QUESTION 1. What is your full name, age, and postoffice address?

ANSWER. Enas J. Hare ... [redacted] Box [redacted]
Oak Leland [redacted]

QUESTION 2. Are you a native-born citizen [redacted]
if so, in what State or Territory were you b[redacted]
if native born and later naturalized in a [redacted]

ANSWER. No not Naturalized

QUESTION 3. Are you the same person [redacted]
[redacted], at the Rockford
3rd day of March, 192[redacted], for the
Lots 1 and 2 [redacted] 23 East 6th P.M.
[redacted], Section 26,
Township 6 N., Range 3 W., 5th Principal Meridian?
If not, give relationship to entryman.

ANSWER. Same

QUESTION 4. Are you married or single? ANSWER. Married

QUESTION 5. If married, of whom does your family consist?

ANSWER.

QUESTION 6. If a married woman, state whether your husband now has an unperfected homestead entry, and during what time he has resided on this land with you. Also state his citizenship qualifications. (See Note 1 at bottom of third page.)

ANSWER.

QUESTION 7. When did you first establish actual residence upon this land?

ANSWER. About April 5th 1923

QUESTION 8. When was your house built on this land?

ANSWER. I moved the house onto the land April 5th 1923

QUESTION 9. Have either you or your family ever been absent from the homestead since establishing residence?

ANSWER. No

QUESTION 10. If there has been such absence, give the dates covered by each absence; and as to each absence state whether you, your family, or both, were thus absent and the reason for each such absence.

ANSWER. None

216a

216b Question 11. Describe the land embraced in above entry by legal subdivisions, showing fully the character of same, and kind and amount of timber, if any.
Answer.

Subdivision	Acres cultivable	Acres timbered	Feet timber
Lots 1 and 2, Sec. 25, Similar	40	Balance, stony and, overflowed land, no timber.	
SW¼NW¼ Sec. 25	5	None—very stony	
Lot 1 Sec. 26	25	No timber—very stony.	
SE¼NE¼ Sec. 26	None	Very stony, no timber.	

Question 12. State the number of acres cultivated, kind of crop planted and amount harvested, each year.

Answer: 1923. I cleared 1 acre on the land I relinquished in 1925. I cut about 2 ton wild hay.

1924. I cleared 1 acre along east line; harvested 3 ton wild hay.

1925. I moved all my buildings to lot 1 Sec. 25 & cleared 3 acre and planted it to clover seed—harvested 5 ton hay.

1926. I cut out 2½ miles of road—cleared 9 acre. Sowed clover and garden ½ acre, harvested 5 ton mixed hay,

1927. I cleared no new land—sowed 5 acre of clover, harvested 5 ton hay and ½ acre of garden.

1928. I cleared 7 acre, sowed clover, harvested 6 ton mixed hay, also large garden.

Question 13. Describe fully and in detail the amount and kind of improvements and number of acres under cultivation on each subdivision. State total value of improvements on the claim.
Answer.

Subdivision	Character of improvements.
Lot 1 Sec. 25	7 acre cultivated, dwelling house, frame, 16x16, 1½ story high, log ice house 20x20—new, Twine house, log, 22x22, fish house, frame, 9x18,—well, 4 ft. sq. 7 ft. deep—1 dock 100 ft. long 4 ft. wide, log const. plank surface.
Lot 2 Sec. 25	1 dock 32 ft. x 8 ft. wide, long construction planked.
SW¼NW¼ Sec. 25	7a. cultivated.
Lot 1 Sec. 26	No clearing excepting road cut through.
SE¼NE¼ Sec. 26	7 acre cultivated. None excepting road cut through it.

Total value of improvements $1515.00.

Question 14. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Answer. No.

Question 15. Are there any indications of coal, salines, or minerals of any kind on the land? If so, describe what they are.

Answer. None.

Question 16. Have you sold, conveyed, or agreed to sell or convey any portion of the land? If so, to whom and for what purpose?

Answer. No.

Question 17. Have you optioned, mortgaged, or agreed to option or mortgage, or convey this land, or any part thereof? If so, when, to whom, and for what purpose and in what amount?

Answer. No.

personal property of any kind elsewhere [redacted], describe the same and state where the same is now.

ANSWER. ...None.....

QUESTION 19. Have you ever made any other homestead entry? If so, describe the same.

ANSWER. ...None.....

QUESTION 20. Have you, since August 30, 1890, made any entry or filing (save mineral) other than homestead? If so, describe the same by legal subdivisions, or by number, kind of entry, and office where made.

ANSWER. ...None.....

I wish to call his attention to [illegible] entered
& reg. and rec. [illegible] & the Colorado also
on Nov 19 1929 and also mineral [illegible] the
second act- Nov 1 1929 Dec 1 1929 Lucas Albers etc

(Give initials, name and [illegible])

NOTE 1.—If applicant is alien born, he should state the fact and file evidence of citizenship in due form, either a certificate of his own naturalization in a court of competent jurisdiction, or, if claiming to be a citizen by virtue of his father's naturalization and his own minority and residence in the United States at the date thereof, or, if a married woman claiming citizenship by virtue of her husband's nativity or naturalization, then record evidence of the naturalization of the father, or husband, or an affidavit as to the nativity of the latter. Applicants who were at one time citizens of the United States, but who later became citizens of a foreign country, must file record evidence of their naturalization. Any female citizen of the United States invoking the benefits of the act of October 17, 1914 (38 Stat., 740), shall make oath showing the nationality of her husband, and that he is entitled to become a citizen of the United States.

NOTE 2.—The officer before whom the proof is made will see that all answers are complete and responsive to the questions.

NOTE 3.—The officer before whom the deposition is taken should call the attention of the witness to section 126 of the U. S. Criminal Code (offer), and state to him that it is the purpose of the Government, if it be ascertained that he [illegible] falsely, to prosecute him to the full extent of the law.

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that I verily believe deponent to be the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me at my office, in [illegible], [illegible] within the [illegible] land district, this [illegible] day of [illegible], 19[illegible].

[illegible]

[illegible]

(Official designation)

1356731

AFFIDAVIT OF HOMESTEAD CLAIMANTS.

I, [illegible], having made a Homestead Entry of the [illegible], Section [illegible], Township [illegible], Range [illegible], [illegible] Meridian, subject to [illegible], under section [illegible] of the Revised Statutes of the United States, do now apply to [illegible] my claim thereto by virtue of section No. [illegible] of the Revised Statutes of the United States; and for that purpose do solemnly [illegible] that I am a [illegible] citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon [illegible] since the [illegible] day of [illegible], [illegible] time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I have held the same as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States, except [illegible]

[illegible]

(Give initials, Christian and Surname.)

Any person swearing falsely to the above affidavit will be punished as provided by law [illegible] (See Sec. 126, U. S. Criminal Code, below.)

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that I verily believe affiant to be a credible person and the [illegible] person hereinbefore described, and that said affidavit was [illegible] scribed and sworn to before me, at my office, in [illegible]

(Give name.)

[illegible] this [illegible] of [illegible], 1907.

[illegible]

[illegible]

UNITED STATES CRIMINAL CODE.

Sec. 126. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years; but in any case where the amount involved in the perjury is less than fifty dollars he shall be fined not more than one hundred dollars or imprisoned not more than one year.

19

105

4—3639 a

Form approved by the Secretary of the Interior November 12, 1910.

RECEIVED
U.S. LAND OFFICE
CASS LAKE, MINNESOTA
Date June 5 1911
Hour 9 a.m.

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

U. S. LAND OFFICE ..... , No. 013608

FINAL PROOF.

TESTIMONY OF WITNESS.

QUESTION 1. What is your full name, age, and post-office address?

ANSWER. .....

QUESTION 2. Was your name correctly given in the published notice?

ANSWER. .....

QUESTION 3. How long have you known the claimant in this case and the tract ... Township ... the land embraced in ...

ANSWER. .....

QUESTION 4. Is entryman married? ANSWER ...

QUESTION 5. Is said tract within the limits ... used in any way for trade or business?

ANSWER. No

QUESTION 6. When did entryman settle upon ...

ANSWER. .....

QUESTION 7. At what date did entryman establish residence on?

ANSWER. .....

QUESTION 8. Have entryman and family resided upon said homestead since thus establishing residence?

ANSWER. Yes

QUESTION 9. Have entryman and family been absent from said homestead since thus establishing residence?

ANSWER. No

QUESTION 10. If there have been any such absences, give the dates covered by such absences, stating who was absent and for what reason.

ANSWER. None

220

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QUESTION 11. Describe the land embraced in above entry by legal subdivisions, showing fully the character of same, and kind and amount of timber, if any.

ANSWER.

Subdivision	Acres Cultivated	Post Office
Lot 6 sec 25	[illegible]	[illegible]
Lot 1 sec 25	[illegible]	[illegible]
Lot 6 sec 26	[illegible]	[illegible]
SE ¼ [illegible]	[illegible]	[illegible]

QUESTION 12. State the number of acres cultivated and kind of crop planted, each year.

ANSWER. 1923, 4a Cleared some land — kept one acre [illegible] to clover and

1924. 4a Cleared probably 2 acres more — at least 2 acres

1925. 4a Cleared 3 acres and planted clover seed on it

1926. Cleared 3 or 4 acres & planted Clover seed

1927. The [illegible] Cleared [illegible] showing but had [illegible]

1928. 4a Cleared & [illegible] Rye seed [illegible] 4a

1929. Now had [illegible] 10 acres Cleared & sowed to grass

QUESTION 13. Describe fully and in detail the amount and kind of improvements and number of acres under cultivation on each subdivision. State total value of improvements on the claim.

ANSWER.

Subdivision	
Lot 6 sec 25	1 or 2 acres cultivated, frame house 10x10 - 2 story high; log use barn 20x20; Land fenced 23 rods, 1 frame tobacco barn 2 [illegible] mill - built & [illegible] 1 [illegible] 1 [illegible] 1

QUESTION 16. Have you personal knowledge, from your own observation, that claimant and his family (if any) actually resided upon and cultivated this land each year in accordance with your above testimony?

ANSWER. .....

.....

QUESTION 17. How many times each year have you seen this land, and the claimant and his family residing thereon; and what other personal knowledge have you upon which your answers are based?

ANSWER. .....

.....

.....

.....

QUESTION 18. [redacted] in this claim, or related to the claimant? If so,

ANSWER. .....

.....

.....

.....

.....

.....

.....

[redacted]

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was reduced to writing by deponent in my presence before deponent affixed signature thereto; that I verily believe deponent to be the identical person described [redacted] and that said deposition was duly subscribed

.....

.....land district,

....., 19..

.....

.....

(Official designation of officer)

UNITED STATES CRIMINAL CODE.

[redacted]

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201

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

U. S. LAND OFFICE ... Minn. ... No. 013608

FINAL PROOF.

TESTIMONY OF WITNESS.

QUESTION 1. What is your full name, age, and post-office address?

ANSWER. ...

QUESTION 2. Was your name correctly given in the published notice?

ANSWER. ...

QUESTION 3. How long have you known the claimant in this case and the lots [illegible], all 26, Rnd of 1 ... Section 26 ...,

Township 63 N., Range 3 W., 5th Principal Meridian, the land embraced in Homestead Entry No. Crookston 013617, made at the Crookston ... Land Office?

ANSWER. ...

QUESTION 4. Is entryman married? ANSWER. ...

QUESTION 5. Is said tract within the limits of an incorporated town, or used in any way for trade or business?

ANSWER. ...

QUESTION 6. When did entryman settle upon the homestead?

ANSWER. ...

QUESTION 7. At what date did entryman establish actual residence thereon?

ANSWER. ...

QUESTION 8. Have entryman and family resided continuously on the homestead since thus establishing residence thereon?

ANSWER. ...

QUESTION 9. Have entryman and family ever been absent from the homestead since thus establishing residence thereon?

ANSWER. ...

QUESTION 10. If there have been any such absences, give the dates covered by such absences, stating who was absent and for what reason.

ANSWER. ...

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QUESTION 11. Describe ... entry by legal subdivisions, showing fully ... kind and amount of timber, if any.

ANSWER.

Subdivision	Acres Cultivated.	Part Fenced.
Lot 1 sec 25		
SW¼ NW¼ " "		
Lot 1 sec 26		
SE¼ NE¼ sec 27		

QUESTION 12. State the ... kind of crop planted, each year.

ANSWER. 1924, Cleared ...
1925, Cleared ... corn and ...
1926, Cleared ... "
1927, Cleared ... Flax ...
1928, Cleared ... Flax ...
19 ...

QUESTION 13. Describe ... and kind of improvements and number of ... each subdivision. State total value of improvements ...

ANSWER.

Subdivision	
Lot 1 sec 25	1 story frame dwg.
Lot 2 sec 26	
SW¼ NW¼ sec 25	
Lot 1 sec 26	
NE¼ sec 26	

QUESTION 14. Are there any ... If so, ...

QUESTION 15. Have you any knowledge or information that claimant has contracted to sell, options ... or agreed to option ... If so, give full details as to when, for what ... and to whom.

HOMESTEAD ENTRY

5-224

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[illegible] 16. Have you personal [illegible]
[illegible] claimant and his family (if any) actually r[illegible]
about this land each year in accordance with your [illegible]

ANSWER. yes

QUESTION 17. How many times each year have you see[illegible] and the claimant and his family residing thereon; and what [illegible] knowledge have you upon which your answers are based?

ANSWER. once a year, [illegible] claim adjoining hers

QUESTION 18. Are you interested in this claim, or related to the claimant? If so, how?

ANSWER. no

[illegible]

(Sign plainly, with full Christian name.)

NOTE.—Norm 1.—The officer before whom the proof is made will see that all answers are complete and responsive to the questions.

[illegible] officer before whom the deposition is taken should add the [illegible] of the witness to express [illegible] and [illegible] duties, and state in full what is the purpose of the [illegible] and be accustomed thereto [illegible] the additional hair to the full extent of the law.

I [illegible] CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was [illegible] or by deponent in my presence before deponent affixed signature [illegible], that I verily believe deponent to be the identical person [illegible] before described, and that said deposition was duly subscribed [illegible] to before me at my office, in Oakland, Lake [illegible] Mendocino [illegible] the Ukiah Lake land district, [illegible] 7 day of June

Philip L. Smith

U. S. Commissioner

(Official designation of officer.)

UNITED STATES CRIMINAL CODE.

Sec. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes such to be administered, that he will truly, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

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226 (Government Exhibit 18.)

(Filed in U. S. District Court on Feb. 13, 1931.)

United States
Department of the Interior
General Land Office
Cass Lake, Minnesota, January 15, 1931.

I, P. M. Larson, hereby certify that I am the Register of the United States Land Office at Cass Lake, Minnesota, and as such an official of the Department of the Interior of the United States Government, have no official seal.

That the following facts appear of record in the official records in my official custody in the United States Land Office, at Cass Lake, Minnesota;

That all the lands acquired by the United States under the Act of Congress of January 14, 1889, and bordering on the Lake of the Woods have been classified as agricultural lands;

That none of the lands acquired by the United States under the Act of Congress of January 14, 1889, in the Red Lake cession listed as Pine lands lie bordering on nor adjacent to the Lake of the Woods.

That all of the lands in the Northwest Angle, Lake of the Woods County, Minnesota, and on the mainland of Lake of the Woods County, Minnesota, and Roseau County, Minnesota, which lie landward of the shore line of the Lake of the Woods and within a distance of one township of such shore land are a part of the lands acquired by the United States under the Act of Congress of January 14, 1889, and all of the lands above-described are classified under said Act as agricultural lands.

P. M. LARSON,
Register.

---

227 (Government Exhibit 19.)

(Filed in U. S. District Court on Feb. 13, 1931.)

United States
Department of the Interior
General Land Office

I, P. M. Larson, hereby certify that I am the Register of the United States Land Office at Cass Lake, Minnesota, and

as such an officer of the Department of the Interior of the United States Government;

That I have no official seal;

That the following facts appear of record in the official records in my official custody in the United States Land Office at Cass Lake, Minnesota:

1. With respect to such of those certain parcels of land described on the attached sheets numbered 1, 2, 3 and so much of sheet No. 4, as is included between the beginning of such sheet and the word and figure "total, 11,213.65" as lie in Roseau and Lake of the Woods Counties, except the northwest angle territory, were opened to homestead entry on October 13, 1898; and so much of the land last identified above as lie in the northwest angle territory of Lake of the Woods County were opened for homestead entry on June 15, 1904;

2. With respect to those certain parcels described on the attached sheets numbered 1, 2, 3, and so much of sheet No. 4 as is included between the beginning of such sheet and the word and figure "total, 11,213.65" as have set opposite the legal description of each parcel respectively the words "withdrawn from homestead entry by Executive Order April 28, 1928," or "withdrawn from homestead entry by Executive Order January 14, 1929," the right of entry thereon was withdrawn by the above described Executive Orders which were filed in my office on May 19, 1928, and January 26, 1929, respectively;

3. Title in fee to those certain tracts and parcels of land described on the attached sheets numbered 1, 2, 3, and so much of sheet number 4 as is included between the beginning of such sheets and the word and figure "total 11,213.65" and comprising in all 11,213.65 acres has been in the United States of America continuously according to the records in my official custody as Register of the United States Land Office, Cass Lake, Minnesota, from the dates hereinbefore specified on which the said lands were opened to homestead entry to date hereof, and between such dates no other person, form or government has had any right, title or interest therein according to the official records in my custody as Register of the United States Land Office at Cass Lake, Minnesota.

4. Title to and ownership of each of those certain tracts and parcels of land described on the attached sheets num-

bered 4, 5, 6 and 7 beginning on sheet numbered 4 with the heading "Lands to which title has reverted back to the United States by homestead entry cancellation between July 25, 1925, and May 4, 1929" have been continuously in the United States of America according to the records in my official custody as Register of the United States Land Office, Cass Lake, Minnesota, from the dates hereinbefore specified on which the said lands were opened to homestead entry to date hereof, and such title and ownership has been in fee except for the rights of persons who have entered thereon under the homestead laws of the United States; and the last homestead entry thereon was cancelled as to each parcel of land so described respectively on the date indicated immediately following each respective legal description.

5. That the acreage figure set opposite each legal description is the acreage shown as to each respective legal description by the official records under my custody as Register of the United States Land Office at Cass Lake, Minnesota.

I hereby set my hand under the three pages of this Certificate at Cass Lake, Minnesota, this seventh day of January, 1931.

P. M. LARSON, Register
U. S. Land Office,
Cass Lake, Minnesota.

... OF THE WOODS PAST DAMAGE CLAIMS

Lake stages, homestead entries and patents, tracts bordering Lake of the Woods in affected zone
(To accompany report to Chief of Engineers dated January

MAXIMUM AND MINIMUM LAKE STAGES IN THE MONTHS OF OPEN WATER (MAY 1st TO NOV. 1st) OF THE YEARS LISTED.				HOMESTEAD ENTRIES OF TRACTS AFFECTED BY LAKE OF THE WOODS FLOWAGE				AC	
Actual Levels		Computed nat. Levels		Tracts Ent'd		Cancellations		Total ac. under entry end of	
Year	Max.	Date	Min.	Date	Max.	Date	Min.	Date	No.	Acres	No.	Acres	Year	
1897	1062.3	8/1	1060.1	5/1	1061.1	8/1	1058.8	5/1	None	None	None	None	None	
1898	1059.9	11/1	1057.0	5/1	1058.5	10/15	1055.6	5/10	27	4058.20	None	None	4058.20	12
1899	1062.1	7/20	1059.8	5/1	1060.8	8/1	1057.0	5/1	11	1618.17	None	None	5676.37	5
1900	1062.0	11/1	1058.8	8/20	1058.5	11/1	1054.9	8/20	6	846.62	None	None	6522.99	1
1901	1061.4	7/15	1060.2	11/1	1059.6	7/15	1057.3	11/1	5	800.15	None	None	6857.34	
1902	1060.7	6/20	1059.2	5/1	1058.1	8/1	1055.4	5/1	15	1676.45	None	None	8065.79	4
1903	1061.4	6/1	1060.1	10/1	1058.6	6/10	1057.2	5/1	32	4848.30	1	40.00	12248.99	13
1904	1060.4	7/10	1059.0	5/1	1057.6	7/20	1056.0	5/1	10	1583.95	None	None	11021.39	3
1905	1062.1	8/20	1058.4	5/1	1059.9	9/20	1055.4	5/1	13	1691.96	1	40.00	10458.08	5
1906	1061.5	5/1	1059.7	11/1	1058.4	7/10	1056.8	11/1	7	973.90	None	None	9179.65	
1907	1062.1	10/20	1058.6	5/1	1058.1	10/20	1055.8	5/1	7	737.05	None	None	8205.56	1
1908	1061.4	6/20	1060.0	11/1	1058.2	7/10	1057.1	11/1	8	1149.42	None	None	7806.28	3
1909	1060.1	11/1	1058.8	5/1	1056.1	11/1	1055.0	5/1	8	789.80	None	None	7072.03	3
1910	1061.5	5/1	1058.3	11/1	1057.1	5/1	1054.3	11/1	11	1226.90	None	None	5384.53	3
1911	1057.6	7/1	1056.8	9/20	1055.3	7/1	1053.2	5/1	9	1094.13	3	164.50	4618.59	6
1912	1060.8	11/1	1057.8	5/1	1055.6	10/10	1053.5	5/1	15	1734.25	2	80.00	5629.22	6
1913	1061.1	5/10	1060.1	10/1	1056.0	8/10	1054.8	5/1	7	946.10	None	None	6402.57	2
1914	1061.4	6/17	1060.3	5/1	1056.5	7/20	1054.7	5/1	16	2218.16	None	None	7559.14	13
1915	1061.8	7/10	1060.2	11/1	1056.9	7/20	1055.1	5/1	19	2393.14	2	232.40	8914.88	16
1916	1064.0	7/1	1060.7	11/1	1060.6	7/10	1058.0	5/1	18	2218.70	1	40.00	8874.48	7
1917	1059.8	7/20	1059.2	5/1	1056.9	5/1	1054.6	11/1	11	953.47	None	None	8951.30	5
1918	1060.6	8/1	1059.3	5/1	1054.7	7/10	1054.1	5/1	21	2353.02	None	None	8799.24	19
1919	1061.9	7/10	1059.8	11/1	1057.3	8/10	1054.6	5/1	20	2104.02	2	80.00	7993.51	11
1920	1060.1	6/10	1059.2	11/1	1057.4	7/1	1056.1	11/1	15	1763.09	4	321.45	6497.45	10
1921	1059.9	5/1	1059.1	11/1	1056.1	6/10	1055.1	11/1	10	689.50	3	355.30	5686.52	2
1922	1060.6	5/20	1059.1	10/20	1056.7	7/20	1055.5	5/1	17	1314.49	9	1034.57	4413.25	1
1923	1060.4	5/20	1059.0	11/1	1055.9	7/1	1054.4	11/1	21	2186.49	2	210.40	5349.94	11
1924	1057.9	5/20	1056.2	11/1	1053.6	5/10	1052.9	11/1	25	2207.05	5	290.47	6791.95	3
1925	1058.8	7/20	1056.2	5/1	1055.7	7/1	1054.0	5/1	6	483.17	6	483.65	6522.72	
1926	1060.8	7/10	1059.8	5/1	1056.3	11/1	1054.0	5/1	3	37.90	None	None	5549.86	3
1927	1062.9	6/1	1060.4	11/1	1061.0	7/10	1059.0	11/1	6	622.08	3	299.45	5322.41	2
1928	1061.3	7/10	1060.0	5/1	1057.6	8/1	1056.2	5/1	3	196.60	9	626.72	4816.77	
1929	1059.8	5/1	1057.8	11/1	1056.5	5/10	1054.0	11/1	None	None	20	1685.18	2773.47	
									None	None	8	1011.07	919.75	

...E OF THE WOODS PAST DAMAGE CLAIMS

...acts bordering Lake of the Woods in affected zone wholly or in part below lake stage 1064 ...ompany report to Chief of Engineers dated January 2, 1931).

...OF OPEN ...STED.	HOMESTEAD ENTRIES OF TRACTS AFFECTED BY LAKE OF THE WOODS FLOWAGE					AC. BELOW: 1064 ENTERED EACH YEAR. LATER PATENTED:	TRACTS PASSED TO PRIVATE OWNERSHIP BY PATENT			ACRES OWNED BY U. S. AFFECTED AREA END OF YEAR
Levels	Tracts Ent'd.		Cancellation		Total ac. under entry end of Year				Total ac. end of year	
Min.	Date	No.	Acres	No.	Acres		No.	Acres		
55.8	5/1	None	None	None	None	None	None	None	None	55,029.44
55.6	5/10	27	4068.20	None	None	4068.20	1395.85	None	None	None	50,971.24
57.0	5/1	11	1618.17	None	None	5676.37	530.90	None	None	None	49,353.07
54.9	5/20	6	846.62	None	None	6522.99	198.60	None	None	None	48,506.45
57.3	11/1	5	800.15	None	None	6857.54	97.70	4	465.80	465.80	47,706.30
55.4	5/1	15	1676.45	None	None	8065.79	422.30	3	468.00	933.80	46,029.85
57.8	5/1	32	4848.30	1	40.00	12248.99	1317.35	4	625.10	1558.90	41,221.55
56.6	5/1	10	1583.95	None	None	11021.39	332.40	18	2811.55	4370.45	39,637.60
55.4	5/1	13	1691.96	1	40.00	10439.08	584.80	15	2234.27	6604.72	37,985.64
54.8	11/1	7	973.90	None	None	9179.65	99.30	15	2233.35	8838.07	37,011.74
55.8	5/1	7	737.05	None	None	8205.56	193.10	12	1711.12	10549.19	36,274.69
57.1	11/1	8	1149.42	None	None	7206.26	348.20	15	2148.70	12697.89	35,125.27
55.0	5/1	8	789.80	None	None	7072.03	395.15	6	923.45	13621.34	34,336.07
54.3	11/1	11	1226.90	None	None	5384.53	363.30	20	2974.40	16595.74	33,109.17
53.2	5/1	9	1094.13	3	164.50	4618.59	666.90	11	1635.57	18231.31	32,179.54
53.5	5/1	15	1734.25	2	80.00	5629.22	678.70	5	643.62	18874.93	30,525.29
54.8	5/1	7	946.10	None	None	6402.57	237.00	2	172.75	19047.68	29,579.19
54.7	5/1	16	2218.16	None	None	7359.14	1368.10	9	1261.59	20309.27	[illegible]
55.1	5/1	19	2393.14	2	232.40	8914.88	1616.40	6	605.00	20914.27	25,800.29
58.0	5/1	18	2218.70	1	40.00	8874.48	705.90	18	2219.10	23133.37	23,021.59
54.6	11/1	11	953.47	None	None	8951.30	548.50	7	876.65	24010.02	22,068.12
54.1	5/1	21	2353.02	None	None	8799.84	1949.40	20	2505.08	26515.10	19,715.10
54.6	5/1	20	2104.02	2	80.00	7993.51	1153.40	20	2829.75	29344.85	17,691.08
56.1	11/1	15	1763.09	4	321.45	6497.45	1023.40	23	2937.70	32282.55	16,249.44
55.1	11/1	10	689.50	3	355.30	5686.52	358.80	12	1145.13	33427.68	15,918.24
55.5	5/1	17	1314.49	9	1034.57	4413.25	172.90	18	1553.19	34980.87	15,635.32
54.4	11/1	21	2186.49	2	210.40	5349.94	1150.25	12	1039.40	36020.27	13,659.23
52.9	11/1	25	2207.05	5	290.47	6791.95	374.40	7	474.57	36494.84	11,742.65
54.0	5/1	6	483.17	6	463.65	6522.72	42.10	3	288.75	36783.59	11,723.13
54.0	5/1	3	57.90	None	None	5549.86	31.60	9	1010.76	37794.35	11,685.33
59.0	11/1	6	622.08	3	299.45	5322.41	228.10	10	550.08	38344.43	11,368.60
56.2	5/1	3	196.80	9	626.72	4816.77	69.70	3	75.52	38419.95	11,792.72
54.0	11/1	None	None	20	1685.18	2773.47	None	4	358.12	38778.07	13,477.90
		None	None	9	1011.07	919.75	None	7	842.65	39620.72	14,486.97

Year	Max.	Date	Min.	Date	Max.	Date	Min.	Date	No.	Acres	No.	Acres	Fy end of Year	
1897	1062.3	6/1	1060.1	5/1	1061.1	6/1	1058.8	5/1	None	None	None	None	None	
*1898	1059.9	11/1	1057.0	5/1	1058.5	10/15	1055.6	5/10	27	4058.20	None	None	4058.20	1
1899	1062.1	7/20	1059.8	5/1	1060.8	6/1	1057.0	5/1	11	1618.17	None	None	5676.37	
1900	1062.0	11/1	1058.8	6/20	1058.5	11/1	1054.9	6/20	6	846.62	None	None	6522.99	
1901	1061.4	7/15	1060.2	11/1	1059.6	7/15	1057.3	11/1	5	800.15	None	None	6857.54	
1902	1060.7	6/20	1059.2	5/1	1058.1	6/1	1055.4	5/1	15	1676.45	None	None	8065.79	
1903	1061.4	6/1	1060.1	10/1	1058.6	6/10	1057.2	5/1	32	4848.30	1	40.00	12248.99	1
*1904	1060.4	7/10	1059.0	5/1	1057.6	7/20	1056.0	5/1	10	1583.96	None	None	11021.39	
1905	1062.1	6/20	1059.4	5/1	1059.9	9/20	1055.4	5/1	13	1691.96	1	40.00	10429.08	
1906	1061.5	5/1	1059.7	11/1	1058.4	7/10	1054.8	11/1	7	973.90	None	None	9179.65	
1907	1062.1	10/20	1058.6	5/1	1058.1	10/20	1055.2	5/1	7	737.05	None	None	8205.56	
1908	1061.4	6/20	1060.0	11/1	1058.2	7/10	1057.1	11/1	8	1149.42	None	None	7206.28	
1909	1060.1	11/1	1058.8	5/1	1056.1	11/1	1055.0	5/1	8	789.80	None	None	7072.03	
1910	1061.5	5/1	1058.3	11/1	1057.1	5/1	1054.3	11/1	11	1226.90	None	None	5384.53	
1911	1057.6	7/1	1056.8	9/20	1055.3	7/1	1053.2	5/1	9	1094.13	3	164.50	4618.59	
1912	1060.8	11/1	1057.8	5/1	1055.6	10/10	1053.5	5/1	15	1734.25	2	80.00	5629.22	
1913	1061.1	5/10	1060.1	10/1	1056.0	8/10	1054.8	5/1	7	946.10	None	None	6402.57	
1914	1061.4	6/17	1060.3	5/1	1056.5	7/20	1054.7	5/1	16	2218.16	None	None	7359.14	13
1915	1061.8	7/10	1060.2	11/1	1056.9	7/20	1055.1	5/1	19	2393.14	2	232.40	8914.88	16
1916	1064.0	7/1	1060.7	11/1	1060.6	7/10	1058.0	5/1	18	2218.70	1	40.00	8874.48	7
1917	1059.8	7/20	1059.2	5/1	1056.9	5/1	1054.6	11/1	11	953.47	None	None	8951.30	5
1918	1060.6	8/1	1059.3	5/1	1054.7	7/10	1054.1	5/1	21	2353.02	None	None	8799.24	19
1919	1061.9	7/10	1059.8	11/1	1057.3	8/10	1054.6	5/1	20	2104.02	2	80.00	7993.51	11
1920	1060.1	6/10	1059.2	11/1	1057.4	7/1	1056.1	11/1	15	1763.09	4	321.45	6497.45	10
1921	1059.9	5/1	1059.1	11/1	1056.1	6/10	1055.1	11/1	10	689.50	3	355.30	5686.52	2
1922	1060.6	5/20	1059.1	10/20	1056.7	7/20	1055.5	5/1	17	1314.49	9	1034.57	4413.25	1
1923	1060.4	5/20	1059.0	11/1	1055.9	7/1	1054.4	11/1	21	2186.49	2	210.40	5349.94	11
1924	1057.9	5/20	1056.2	11/1	1053.6	5/10	1052.9	11/1	25	2207.06	5	290.47	6791.95	3
1925	1058.8	7/20	1056.2	5/1	1055.7	7/1	1054.0	5/1	6	483.17	6	463.65	6522.72	
1926	1060.8	7/10	1059.8	5/1	1056.3	11/1	1054.0	5/1	3	57.90	None	None	5549.86	
1927	1062.9	6/1	1060.4	11/1	1061.0	7/10	1059.0	11/1	6	622.08	3	299.45	5522.41	2
1928	1061.3	7/10	1060.0	5/1	1057.6	8/1	1056.2	5/1	3	198.60	9	626.72	4816.77	
1929	1059.8	5/1	1057.8	11/1	1056.5	5/10	1054.0	11/1	None	None	20	1685.18	2773.47	
1930									None	None	9	1011.07	919.75	
								Totals -	400	47515.63	82			125

*Lands south shore of lake opened for settlement October 3, 1898.

‡Lands Northwest Angle and south shore of lake opened for settlement October 3, 1898 and June 15,

1. International Joint Commission started investigation on regimen of lake levels, holding first h
Minnesota, September 18, 1912.

2. Final report filed by International Joint Commission on June 12, 1917.

3. Remaining public lands in affected area withdrawn from homestead entry by Executive Orders date

Min.	Date	Entries: No.	Entries: Acres	Cancellations: No.	Cancellations: Acres	Entry end of Year	PATENTED: No.	PATENTED: Acres	Forfeited: No.	Forfeited: Acres	Total ac. end of year	Entry END OF YEAR
1055.8	5/1	None	None	None	None	None	None	None	None	None	None	55,029.44
1055.6	5/10	27	4058.20	None	None	4058.20	1595.65	None	None	None	None	50,971.24
1057.0	5/1	11	1618.17	None	None	5676.37	530.90	None	None	None	None	49,353.07
1054.9	8/20	6	846.62	None	None	6522.99	198.60	None	None	None	None	48,506.45
1057.3	11/1	5	800.15	None	None	6857.54	97.70	4	465.80	465.80	47,706.30	
1055.4	5/1	15	1676.45	None	None	8065.79	422.30	3	468.00	933.80	46,029.85	
1057.8	5/1	32	4848.30	1	40.00	12848.99	1317.35	4	625.10	1558.90	41,221.55	
1056.9	5/1	10	1583.95	None	None	11021.39	332.40	18	2811.55	4370.45	39,637.60	
1055.4	5/1	13	1691.96	1	40.00	10459.08	584.80	15	2234.27	6604.72	37,965.64	
1054.8	11/1	7	973.90	None	None	9179.65	99.30	15	2233.35	8838.07	37,011.74	
1055.8	5/1	7	737.05	None	None	8205.56	193.10	12	1711.12	10549.19	36,274.69	
1057.1	11/1	8	1149.42	None	None	7206.28	348.20	15	2148.70	12697.89	35,125.27	
1055.0	5/1	8	789.80	None	None	7072.03	395.15	6	923.45	13621.34	34,336.07	
1054.3	11/1	11	1226.90	None	None	5324.53	363.30	20	2974.40	16595.74	33,109.17	
1053.2	5/1	9	1094.13	3	164.50	4618.59	666.90	11	1635.57	18231.31	32,179.54	
1053.5	5/1	15	1734.25	2	80.00	5629.22	678.70	5	643.62	18874.93	30,525.29	
1054.8	5/1	7	946.10	None	None	6402.57	237.00	2	172.75	19047.68	29,579.19	
1054.7	5/1	16	2218.16	None	None	7359.14	1368.10	9	1261.59	20309.27	[illegible]	
1055.1	5/1	19	2393.14	2	232.40	8914.88	1616.40	6	605.00	20914.27	25,200.29	
1058.0	5/1	18	2218.70	1	40.00	8874.48	705.90	18	2219.10	23133.37	23,021.59	
1054.6	11/1	11	953.47	None	None	8951.30	548.50	7	876.65	24010.02	22,068.12	
1054.1	5/1	21	2353.02	None	None	8799.84	1949.40	20	2505.08	26515.10	19,715.20	
1054.6	5/1	20	2104.02	2	80.00	7993.51	1153.40	20	2829.75	29344.85	17,691.08	
1056.1	11/1	15	1763.09	4	321.45	6497.45	1023.40	23	2937.70	32282.55	16,249.44	
1055.1	11/1	10	669.50	3	355.30	5686.52	358.20	12	1145.13	33427.68	15,915.24	
1055.5	5/1	17	1314.49	9	1034.57	4413.25	172.90	18	1553.19	34980.87	15,635.32	
1054.4	11/1	21	2186.49	2	210.40	5349.94	1150.25	12	1039.40	36020.27	13,659.23	
1052.9	11/1	25	2207.05	5	290.47	6791.95	374.40	7	474.57	36494.84	11,742.65	
1054.0	5/1	6	483.17	6	483.65	6522.72	42.10	3	288.75	36783.59	11,723.13	
1054.0	5/1	3	37.90	None	None	6549.86	31.60	9	1010.76	37794.35	11,685.83	
1059.0	11/1	6	622.08	3	299.45	6522.41	228.10	10	550.08	38344.43	11,368.60	
1056.2	5/1	3	198.60	9	626.72	4816.77	69.70	3	75.52	38419.95	11,792.72	
1054.0	11/1	None	None	20	1685.18	2773.47	None	4	358.12	38778.07	13,477.90	
		None	None	9	1011.07	919.75	None	7	842.65	39620.72	14,486.97	
Totals -		400	47515.63	82			18537.88	312				

ement October 3, 1898.
ke opened for settlement October 3, 1898 and June 15, 1904.
vestigation on regimen o. lake levels, holding first hearing at Warroad, Minnesota,

Commission on June 12, 1917.
thdrawn from homestead entry by Executive Orders dated April 28, 1928 and January 14, 1929.

228

Government Exhibit 25.
(Filed in U. S. District Court Feb. 13, 1931.)

229 (Government Exhibit 29.)

(Filed in U. S. District Court on Feb. 13, 1931.)

Warranty Deed

Llyod Henry Harrison, a single man to Harry Brewster.

Filed for record the 4 day of April A. D. 1923, at 11 o'clock A. M.

HANS B. IMSDAHL, Register of Deeds.

This Indenture, Made this 14th day of February in the year of our Lord, one thousand nine hundred and twenty three, between Lloyd Henry Harrison, a single man, of the County of Lake of the Woods and State of Minnesota, party of the first part, and Harry Brewster of the County of Lake of the Woods and State of Minnesota, party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of Fifteen hundred and no/100 Dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby Grant, Bargain, Sell and Convey to the said party of the second part, his heirs and assigns, Forever, all that tract or parcel of land lying and being in the County of Lake of the Woods and State of Minnesota, described as follows, to-wit:

Lot two (2) of Section two (2), and lots one (1), two (2) and three (3) of Section three (3) in Township one hundred sixty five (165), North, and lots two (2) and three (3) of Section thirty four (34) and lots three (3) and four (4) of Section thirty five (35) in Township one hundred sixty six (166) North, all in Range thirty five (35) West of the fifth principal meridian, Minnesota, containing one hundred sixty and five hundredths acres, be the same more or less, according to the United States Government survey thereof.

Revenue Stamp $1.50 cancelled.

To Have and to Hold the Same, Together with all hereditaments and appurtenances thereunto belonging, or in anywise appertaining, unto the said party of the second part, his heirs and assigns, Forever. And the said Lloyd Henry Harrison, party of the first part, for himself and his heirs, executors and administrators, does covenant with the said party of the second part, his heirs and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid,

and that the same are free from all encumbrances except none, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will Warrant and Defend.

In Testimony Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

LLOYD HENRY HARRISON (Seal)

Signed, Sealed and Delivered in Presence of
Bert Hanson
Wm. Walt

230 State of Minnesota, County of Roseau—ss.

On this 14th day of February A. D. 1923, before me a Notary Public within and for said County, personally appeared Lloyd Henry Harrison, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

(Notarial Seal) BERT HANSON, Bert Hanson
Notary Public, Roseau Co., Minn.
My commission expires Sept. 11, 1928.

Endorsements.

I hereby certify that the taxes for the year 1922 on within described lands are paid.

JOHN F. CLARK, Treasurer
Lake of the Woods County. E. N.

Taxes paid and transfer entered this 4th day of April, 1923.

M. D. WEEKS,
Auditor.

231 Register's Certificate of Copy of Record

State of Minnesota, County of Lake of the Woods—ss.

I, Hans B. Imsdahl, Register of Deeds in and for said County and State aforesaid, do hereby certify that I have compared the foregoing and attached paper in writing, consisting of one sheet, and purporting to be a copy of that certain Warranty Deed given by Lloyd Henry Harrison, a single man, to Harry Brewster, and filed for record on the 4th day of April A. D. 1923, at 11 o'clock A. M., as Instrument Num-

ber 411 with the original record thereof, as recorded in Book 3 of Deed Record at page 42 of the public records now remaining in my said office, and that the same is a true and correct transcript of the original record of said instrument and the whole thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, at the Village of Baudette, Minnesota in said County, this 20th. day of December, A. D. 1930.

(Seal)

HANS B. IMSDAHL,
Register of Deeds.

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232 (Government Exhibit 33.)

(Filed in U. S. District Court on Feb. 13, 1931.)

Deed Record No. 47
Instrument No. 54473

.....

To .....

Beltrami County, Minnesota.

Filed for record the 18 day of Aug. A. D., 1915, at 10 o'clock a. m., (page) 465 C. O. Moon, Register of Deeds, by H. D....., deputy.

Taxes paid and transfer entered this 18 day of Augt. A. D., 1915; J. L. George, County auditor, H. W. Alsop

This Indenture, made this 12th day of August, in the year of Our Lord one thousand nine hundred and fifteen, between Richard C. Edwards and Edith V. Edwards, his wife, parties of the first part, and John R. Morris and William F. Steffes, parties of the second part,

Witnesseth, That the said parties of the first part, in consideration of the sum of twelve hundred & 00/100 Dollars, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do hereby Grant, Bargain, Sell, and Convey unto said parties of the second part, their heirs and assigns, Forever, all those tracts or parcels of land lying and being in the county of Beltrami and state of Minnesota, described as follows, to-wit:

The northeast quarter of the southeast quarter (NE¼-SE¼) and the southeast quarter of the southeast quarter (SE¼-SE¼) of Section seventeen (17) and the Lot five (5)

of Section sixteen (16) in Township one hundred sixty-two (162) north of Range thirty-two (32) west of the fifth principal meridian, Minnesota, containing one hundred nineteen and twenty-five hundredths (119.25) acres, according to the United States government survey thereof.

(I. R. Stamp $1.50 cancelled)

To Have And To Hold The Same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, unto the said parties of the second part, their heirs and assigns, Forever. And the said Richard C. Edwards and Edith V. Edwards his wife, parties of the first part, for their heirs, executors, and administrators, do covenant with the said parties of the second part, ...heirs and assigns, that they are well seized in fee of the lands and premises aforesaid, and ha.. good right to sell and convey the same in manner and form aforesaid, and that the same are free from all encumbrances; and the above bargained and granted lands and premises in the quiet and peaceable possession of the said parties of the Second part, their heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will Warrant And Defend.

In Testimony Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

RICHARD C. EDWARDS, (Seal)
EDITH V. EDWARDS. (Seal)

Signed, sealed, and delivered in presence of:
Morris Willett, G. A. Soderstrom

State of Minnesota,
County of Beltrami—ss.

On this 12th day of August, A. D. 1915, before me, a notary public within and for said county, personally appeared Richard C. Edwards and Edith V. Edwards, his wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

(Notarial Seal) MORRIS WILLETT,
Notary Public, Beltrami County.

My commission expires June 10th, 1922.

233 State of Minnesota,
County of Lake of the Woods—ss.

I, Hans B. Imsdahl, Register of Deeds in and for said County and State aforesaid, do hereby certify that I have compared the foregoing and attached paper in writing consisting of one sheet and purporting to be a copy of that certain Warranty Deed given by Richard C. Edwards and wife to John R. Morris, et al., and filed for record in the office of the Register of Deeds, Beltrami County, Minn., on the 18 day of Aug. A. D., 1915, at 10 o'clock a. m. and duly recorded in Book 47 of Deed Record on page 465 as Instrument No. 54473 and later by reason of County Division was transcribed into Book F of Deeds, page 501, Lake of the Woods County, Minnesota, record, with the transcribed record thereof, as recorded in Book F of Deeds at page 501 of the public records now remaining in my said office, and that the same is a true and correct transcript of the transcribed record of said instrument and the whole thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, at the Village of Baudette, Minnesota in said County, this 24th day of December, A. D. 1930.

(Notarial Seal) HANS B. IMSDAHL,
Register of Deeds.

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234 (Government Exhibit 40.)

(Filed in U. S. District Court on Feb. 13, 1931.)

Deed of Administrator.

No. 3572.

This Indenture, Entered into this sixth day of June 1925, by and between Andrew Johnson as Administrator of the Estate of John Hagen party of the first part, and Andreas Strandenas, of the County of Lake of the Woods State of Minnesota party of the second part, Witnesseth, That the said party of the first part, having been thereunto authorized and empowered by the order of license made and filed in the Probate Court of Lake of the Woods County, Minnesota, on the 25th day of May 1925, in the matter of the estate of the above-named John Hagen, having made and filed in said court the bond and oath required by law and said order of license, having given the notice of sale and published the same as required by law and said order of license, having complied in all respects with the terms and conditions of said order of

license, having, at the time and place specified therefor in said notice of sale, offered the real estate hereinafter described for sale at public auction to the highest bidder and sold the same to such highest bidder, to-wit: to Andreas Strandenas the party of the second part hereto for the sum of Six Hundred Dollars, having made and filed in said Probate Court due report of said sale, and said court having confirmed said sale by its order in said matter made and filed on the fifth day of June 1925; does, pursuant to said order of license and said order of confirmation and in consideration of the sum of Six Hundred ($600.00) Dollars to him in hand paid, the receipt of which is hereby acknowledged, hereby Grant, Bargain, Sell and Convey unto said party of the second part, his heirs and assigns, that tract of land lying in the County of Lake of the Woods State of Minnesota, described as follows, to-wit:

Northeast quarter of the northeast quarter (NE¼ NE¼) Section Twenty Nine (29) Township One Hundred Sixty Two (162) North of Range Thirty two (32) West of the 5th Principal Meridian, Minnesota, containing 40 acres more or less according to the United States Government survey thereof

To Have And To Hold, The above granted land and premises unto said party of the second part, his heirs and assigns, Forever.

In Witness Whereof, Said party of the first part has hereunto set his hand and seal the day and year first above written.

(Revenue Stamp $1.00 Cancelled)

ANDREW JOHNSON, (Seal)
As Administrator of the Estate of
John Hagen.

Signed, Sealed and Delivered
in Presence of:
H. C. Hanson.
C. C. Ortman.

State of Minnesota,
County of Lake of the Woods—ss.

On this sixth day of June 1925, before me personally appeared Andrew Johnson, administrator of the Estate of John Hagen to me known to be the person described in and

who executed the foregoing instrument and acknowledged he executed the same as his free act and deed.

(Notarial Seal)

H. C. HANSON,
H. C. Hanson,
Notary Public, Lake of the Woods County, Minn.

My Commission expires February 17th, 1929.

Filed for record on the 6th day of June, A. D., 1925 at 5:30 o'clock P. M.

HANS B. IMSDAHL,
Register of Deeds.

I hereby certify that the taxes for the year 1924 on within described lands are paid.

JOHN F. CLARK,
Treasurer Lake of the Woods County.

Taxes paid and transfer entered this 6th day of June, A. D., 1925.

M. D. WEEKS,
County Auditor.

235 State of Minnesota,
County of Lake of the Woods—ss.

I, Hans B. Imsdahl, Register of Deeds in and for said County and State aforesaid, do hereby certify that I have compared the foregoing and attached paper in writing, consisting of one sheet, and purporting to be a copy of that certain Deed of Administrator given by Andrew Johnson, As Administrator of the Estate of John Hagen to Andreas Strandenas, and filed for record on the 6th day of June, A. D., 1925 at 5:30 o'clock P. M., as Instrument Number 3572, with the original record thereof, as recorded in Book 1 of Deed Record at page 307 of the public records now remaining in my said office, and that the same is a true and correct transcript of the original record of said instrument and the whole thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, at the Village of Baudette, Minnesota, in said County, this 22nd day of December, A. D., 1930.

(Notarial Seal)

HANS B. IMSDAHL,
Register of Deeds.

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236 (Government Exhibit 50.)

(Filed in U. S. District Court on Feb. 13, 1931.)

This Indenture, Made this 10th day of August, in the year of our Lord one thousand nine hundred twenty-one, between

Alfred F. Green, an unmarried man, of the County of Roseau and State of Minnesota, party of the first part, and Randor G. Karlson, of the County of Roseau and State of Minnesota, party of the second part;

Witnesseth, That the said party of the first part, in consideration of the sum of one and No/100 Dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby Grant, Bargain, Sell, Remise, Release, Quit-Claim and Convey unto the said party of the second part, his heirs and assigns, Forever, all the following tracts or parcels of land lying and being in the County of Roseau and State of Minnesota, described as follows, to-wit:

Lots one (1), two (2) and the southwest quarter of the northeast quarter (SW¼NE¼) of section five (5) in township one hundred sixty-two (162) North of Range thirty-five (35) west of the 5th principal meredian, containing 123.65 acres of land, be the same more or less, according to the United States Government survey thereof,

To Have and to Hold, the above Quit-Claimed premises, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, his heirs and assigns, Forever,

In Testimony Whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

ALFRED F. GREEN (Seal)

Signed, Sealed and Delivered in Presence of
Alexander Fosmark
Bert Hanson

237 State of Minnesota,
County of Roseau—ss.

On this 10th day of August, A. D. 1921, before me, a U. S. Commissioner, District of Minnesota, within and for said County, personally appeared Alfred F. Green, an unmarried man, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

ALEXANDER FOSMARK,
U. S. Commissioner, District of Minnesota.

(U. S. Comm.)
(Seal)

#71376 Quit-Claim Deed Alfred F. Green to Randor G. Karlson Office of Register of Deeds County of Roseau, Minn. I hereby certify that the within Instrument was filed in this office for record on the 5th day of December A. D. 1921, at 1 o'clock P. M., and was duly recorded in Book 127 of Deeds on page 205 J. A. Burkee, Register of Deeds. Taxes paid and transfer entered this 5 day of December, 1921 S. G. Bertilrud County Auditor. I hereby certify that the taxes for the year 1920 on the lands described within are paid. Paul Wallin County Treasurer.

238 I, J. A. Burkee, Register of Deeds in and for the County of Roseau and State of Minnesota, do hereby certify that the annexed written instrument is a full, true, and perfect copy of that certain Quit Claim Deed recorded in Book 127 on page 205 of the records of the Register of Deeds of above County and State, which records are in my custody as such officer.

Witness my signature and official seal this 22 day of December, A. D. 1930.

J. A. BURKEE,
(Seal) Register of Deeds in and for Roseau County, Minn.

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239 United States Government Exhibit No. 60.

Certified Exhibits to Accompany Division 1 of Canada's Representation.

240 List of Exhibits.
Division I.

Number

Statement by I. R. Strome re Shoreline of Lake of the Woods.

Letter from L. V. Rorke to J. T. Johnston, dated Dec. 3, 1929, re lands granted in Ontario at Nov. 30, 1920.

Statement by W. S. Gliddon re lands granted in Manitoba at Sept. 21, 1915.

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241 Estimate of Short Line Mileages around Lake of the Woods.

In the following tabulation the miles of shore line around the mainland and of Lake of the Woods and of the islands of

one mile or more in diameter, have been scaled from the standard map of the Lake of the Woods watershed issued in 1916 with the Report of the Consulting Engineers, on the Lake of the Woods levels to the International Joint Commission.

In addition to the main shore line and the said larger islands there are some 10,000 smaller islands scattered throughout the northern portion of the lake. These islands have been estimated at an average diameter of about 85 feet and shore line of 264 feet or a collective shore line amounting to some 500 miles.

The mileages determined as per the foregoing are as follows:

	Shore Line Mileage.		
I. In Canada			
(a) In Ontario			
Mainland	875		
Mouth of Rainy River to Baudette	12	887	
Islands one mile or over in diameter		663	
Small islands estimated 10,000 in number		500	
Total for Ontario			2050
(b) In Manitoba			
Mainland			35
Total for Canada			2085
242	Shore Line Mileage.		
II. In United States			
Mainland			115
Islands			25
Total for United States			140
Grand Total			2225

Note: The shore line of the Indian Reserves as included in the above is 250 miles.

Sgd. I. ROY STROME,
Asst. Engineer of the Canadian Lake of the Woods Control Board.
15th Jan., 1931.

Sgd. J. T. Johnston,
Witness.

243 Affidavit.

Dominion of Canada,
Province of Ontario
County of York

To Wit:

I, Greta E. M. Stork, Stenographer, of the City of Toronto, County of York, make oath and say:—

That I know L. V. Rorke, the Surveyor-General and Deputy Minister whose signature is on the attached letter, dated December 3rd. 1929, to J. T. Johnston, Director of the Dominion Water Power and Reclamation Service.

That I know the said L. V. Rorke's signature.

That the signature on the attached letter is a true photostat copy.

GRETA E. M. STORK.

Sworn before me in the City of Toronto, this 8th day of January, A. D. 1931.

F. E. TITUS,
(Notarial Seal) A Notary Public for Ontario.

244 Ontario

Department of Surveys.

Toronto, December 3rd, 1929.

Dear Mr. Johnston,

Replying to your letter of the 30th ult., in which you wish to be advised as to the number of parcels of land disposed of on the shore of Lake of the Woods within the Province of Ontario, prior to the 30th November 1920, when a reservation was placed on further sales or leases of lands for flooding rights to elevation 1064, I find that the number of such leases or patents, according to a rough count from our plans, is 725. This is made up as follows:—

Islands in northerly part of Lake of the Woods and parcels on the mainland adjoining.	500
Islands and parcels of mainland in the westerly part of Lake of the Woods including Shoal Like.	150
Mainland parcels in the townships of Morson, McCrosson and Spohn, District of Rainy River.	41
Locations on the mainland at Keewatin and Kenora, formerly Rat Portage.	32
	723

While the above represents the number of patents granted, you will note that the 32 parcels granted in Kenora and Keewatin have since been subdivided and into town lots and smaller parcels, and I assume that each individual owner would present a claim for damages, and it would not be confined to 32 as above mentioned.

245 Trusting this information is sufficient for your requirements,

I am,

Yours truly,
L. V. RORKE,
Surveyor General, Deputy Minister.

LVR/VS.

J. T. Johnston Esq., Director,
The Dominion Water Power & Reclamation Services,
81, Metcalfe Street,
Ottawa. Ontario.

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246 Canada,
Province of Ontario—To-wit:

I, FRANK WILLIAM CHAMBERS CUMING, of the City of Ottawa, in the Province of Ontario, Civil Servant, make oath and say:

1. That I was personally present and did see William Searle Bliddon, named in the within instrument, who is personally known to me to be the person named therein, duly sign, seal and execute the same for the purposes named therein.

2. That the same was executed at the City of Ottawa, in the Province of Ontario, Canada, aforesaid, and that I am the subscribing witness thereto.

3. That I know the said William Searle Gliddon and is in my belief of the full age of twenty-one years.

(Sgd.) F. W. C. CUMING.

Sworn to at the City of Ottawa, in the Province of Ontario, this 15th day of January, A. D. 1931, Before me,

(Sgd.) K. R. DALY,
A commissioner for Oaths in and for the Province of Ontario.

(Seal)
Kenneth R. Daly,
Notary Public in and for Ontario.

247 Department of the Interior
Dominion Lands Administration

Take Notice that I, William Searle Gliddon, of the City of Ottawa, in the County of Carleton, Province of Ontario and Dominion of Canada, Esquire, Registrar of Dominion Lands Patents, hereby certify that according to the records of the Dominion Lands Administration no parcel of land in the Province of Manitoba have been patented by the Crown covering lands bordering on the southern shores of the Lake of the Woods in the Province of Manitoba.

(Sgd.) WM. S. GLIDDON,
Registrar of Dominion Lands Patents.

Dated at the City of Ottawa, in the Province of Ontario, this 15th day of January, A. D. 1931.

Witness:
(Sgd.) F. W. C. CUMING.

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248 Government Exhibit No. 61.

Certified Exhibits to Accompany Division II of Canada's Representation

249 List of Exhibits

Division II.

Number.

Lac Seul Conservation Act, 1928.

Manitoba Natural Resources Act, 1930.

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250 Division II.

Ownership of a large part of the shorelands by the Province of Ontario.

Extracts from Pertinent Acts

1. Schedule of agreement of 28th day of February 1928 accompanying the Lac Seul Conservation Act, 1928.

Preamble. "Whereas the Crown in the right of the Province of Ontario is the owner of the lands under and bordering on Lac Seul in the District of Kenora in the Province of Ontario and also of all ungranted lands under and bordering on the rivers and waters flowing into and out of said lake in

the Province of Ontario, and the water powers and water power sites connected therewith;

"And whereas the Crown in the right of the Dominion of Canada is the owner of all ungranted lands under the waters of the Winnipeg River in the Province of Manitoba and the water powers and water power sites connected therewith and has leased certain of such power sites to companies and others who have developed the same in whole or in part;

"And whereas there are a number of water powers and water power sites at the outlet of Lac Seul and upon the English and Winnipeg Rivers between that lake and the Provincial Boundary between the Provinces of Ontario and Manitoba, all of which powers are vested in the Crown in the right of the Province of Ontario and none of which has as yet been developed;

"And whereas it is desirable to construct a regulating dam at Lower Ear Falls at the outlet of Lac Seul for the purpose of increasing the capacity of the power plants already erected and that may hereafter be erected on the Winnipeg River in the Province of Manitoba;

"And whereas the erection of a dam at Lower Ear Falls will facilitate the development of power at that point, and be of advantage in the development of power at other power sites on the waters flowing out of Lac Seul between Lower Ear Falls and said Provincial Boundary;

"And whereas Canada has requested Ontario to erect a dam at the location and for the purposes aforesaid, and has offered to contribute towards the cost of the construction and maintenance of the same, and Ontario has agreed so to do subject to the terms, stipulations, conditions and reservations hereinafter contained."

Paragraph 2. "Ontario shall construct a dam for the purposes of conservation, regulation and power at Lower Ear Falls at the outlet of Lac Seul on lands owned by the Crown in the right of the Province of Ontario which said dam
251 shall be absolutely owned, controlled and operated by Ontario and neither of the other parties hereto shall have any ownership in, title to or authority or control over it."

Paragraph 5. "Three-fifths of the capital cost of said dam shall be paid, and borne by Canada and two-fifths by Ontario, said proportions being approximately equivalent to the difference in the mean water elevation between said Provincial Boundary and Lake Winnipeg, and between the present mean water level of Lac Seul and the said Provincial Boundary."

Paragraph 7. "After the said dam has been completed and put in operation the total interest on the capital cost apportioned to and contributed by Ontario under the provisions of paragraph 5 hereof shall be paid annually at the rate of five per centum per annum by Canada to Ontario, subject to the provision in the next succeeding paragraph hereof contained."

Paragraph 10. "The cost of maintenance and operation of said dam shall be wholly paid by Canada until powers on said waters have been developed and put to use. As such powers are developed and put to use, Ontario shall pay that proportion of two-fifths of the cost of such maintenance and operation that the head so developed and used on said waters bears to the total developable head thereon. When and so soon as the total developable head on said waters has been fully developed and put to use, Canada shall bear three-fifths and Ontario two-fifths of the cost of said maintenance and operation."

2. Agreement of November 15, 1922 between Ontario, Manitoba and Canada, ratified by the Manitoba Natural Resources Act.

Preamble. "This agreement, as a working basis for the regulation of the English and Winnipeg rivers, is entered into on the understanding that all parties are agreeable to the repeal of the Lake of the Woods Regulation Act 1921, but Ontario does not bind itself to the terms of this agreement in the event of that Act not being repealed."

252 Government Exhibit No. 62.

Certified Exhibits to Accompany Division V of Canada's Representation

253 List of Exhibits

Division V.

	Number.
British North America Act, 1867.	
Manitoba Act, 1870.	
Dominion Lands Act.	
Manitoba Natural Resources Act.	
Indian Act.	
Ontario Public Lands Act.	

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254 Division V.

The shore lands are subject to four (now five) separate governmental jurisdictions, three of which are in Canada namely, the Dominion, Ontario and Manitoba.

Extracts from Pertinent Acts.

1. The British North America, Act, 1867. (Imperial.)

Preamble. "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual admission into the Union of other Parts of British North America."

Distribution of Legislative Powers.

Section 91. "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Com-

mons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

1. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

9. Beacons, Buoys, Lighthouses and Sable Island.

10. Navigation and Shipping.

12. Sea Coast and Ireland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

24. Indians, and Lands reserved for the Indians."

255 Section 92. "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

13. Property and Civil Rights in the Province."

Section 109. "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

2. The Manitoba Act, 1870. (Dominion.)

Section 30. "All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion, subject to, and except and so far as the same may be affected by, the conditions and

stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty."

3. The Dominion Lands Act. (Dominion.) (Ch. 113 R. S. C. 1927.)

Section 3. "Except as provided by this or any other Act of the Parliament of Canada, this Act applies,

(a) to the lands of the Dominion of Canada in the provinces of Manitoba, Saskatchewan and Alberta, and in the Northwest Territories of Canada;

(b) to the three and one-half million acres of land in that portion of the Peace River district of British Columbia, lying east of the Rocky Mountains and adjoining the province of Alberta, granted to the Crown, as represented by the Government of Canada, by section 7, chapter 14 of the British Columbia Statutes of 1884, 1908, c. 20, s. 3."

4. The Manitoba Natural Resources Act. (Dominion.) (20-21 Geo. V. c. 29.)

Article 1. "In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this agreement, and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to
256 any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Prov-

ince shall not be liable to account to Canada for any such payment made thereafter."

5. The Indian Act. (Dominion.) (Ch. 98 R. S. C. 1927.)

Section 4. "The Minister of the Interior, or the head of any other department appointed for that purpose by the Governor in Council, shall be the Superintendent General of Indian Affairs, and shall, as such, have the control and management of the lands and property of the Indians in Canada."

Section 19. "All reserves for Indians, or for any band of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as they were held heretofore, but shall be subject to the provisions of this Part."

Section 54. "All Indian lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part."

6. The Public Lands Act. (Ontario.) (Ch. 35 R. S. O. 192.)

Section 2. "The Department of Lands and Forests shall be presided over by the Minister of Lands and Forests and shall have the management, sale and disposition of the public lands and forests."

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257 Government Exhibit No. 63.

Certified Exhibits to Accompany Division VI of Canada's Representation.

258 List of Exhibits.

Division VI.

Number.

British North America Act, 1867.

Navigable Waters Protection Act.

Boundary Waters Treaty of 1909.

The International Boundary Waters Treaty Act.

259 Division VI.

The Lake of the Woods is a navigable water and hence subject to Federal Control.

Extracts from Pertinent Acts &c.

1. The British North America Act, 1867.

Section 91. "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

10. Navigation and Shipping."

2. The Navigable Waters Protection Act. (c. 140 R. S. C.) first passed in 1927.

Section 2 (b). " 'work' includes any bridge, boom, dam, aboiteau, wharf, dock, pier or other structure, tunnel or pipe, or telegraph or power cable or wire and the approaches or other works necessary or appurtenant thereto, or any work, structure or device, whether similar in character to the foregoing or not, which may interfere with navigation."

Section 4. "No work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council.

2. The provisions of this section shall not apply to small wharves or groynes or other bank or beach protection works, or boat-houses, if in the opinion of the Minister of Public Works

(a) they do not interfere with navigation, and

(b) do not cost more than one thousand dollars."

3. Boundary Waters Treaty of 1909.

Preliminary Article. "For the purposes of this Treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of

Canada passes, including all bays, arms, and inlets thereof,
but not including tributary waters which in their nat-
260 ural channels would flow into such lakes, rivers, and
waterways, or waters flowing from such lakes, rivers,
and waterways, or the waters of rivers flowing across the
boundary."

Article 3. "It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a Joint Commissioner, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbours, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes."

4. An Act relating to the establishment and expenses of the International Joint Commission under the Waterways Treaty of January the Eleventh, Nineteen Hundred and Nine. (1-2 George V. C. 28).

Section 1. "The treaty relating to the boundary waters and to questions arising along the boundary between Canada and the United States made between His Majesty and the said United States signed at Washington the eleventh day of January, one thousand nine hundred and nine, and the protocol of the fifth day of May, one thousand nine hundred and ten, in the Schedule to this Act, are hereby confirmed and sanctioned."

Section 2. "The laws of Canada and of the several provinces thereof are herey amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the said treaty; and so as to sanction, confer and impose the various rights, duties and disabilities intended by the said treaty to be conferred or imposed or to exist within Canada."

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261 Government Exhibit No. 64.

Certified Exhibits to Accompany Division VII of Canada's Representation.

262 List of Exhibits.

Division VII.

Number

Agreement of June 22, 1898, between Keewatin Power Co. and the Crown.

Dominion Order in Council of Jan. 21, 1919.

Ontario Order in Council of Feb. 13, 1919.

Lake of the Woods Regulation Act, 1921.

Dominion Order in Council of Sept. 21, 1921.

Lac Seul Conservation Act, 1928.

Lake of the Woods Control Board Act, 1921.

Proclamations bringing into effect Lake of the Woods Control Board Act, 1921, and Lac Seul Conservation Act, 1928.

Lake of the Woods Control Board Act, 1922.

Lac Seul Conservation Act 1928.

Proclamation bringing into effect Lake of the Woods Control Board Act, 1922, and Lac Seul Conservation Act, 1928.

Dominion Order in Council, dated June 20, 1928.

Ontario Order in Council, dated June 27, 1928.

Lake of the Woods Treaty of 1925.

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263 Division VII.

The Lake of the Woods Outlets have been continuously controlled by the Governments of Ontario and the Dominion from 1898 to date.

Extracts from Pertinent Agreements, Acts, &c.

1. Agreement between the Crown in the right of Ontario and Keewatin Power Company dated June 22, 1898.

"This Agreement, made the 22nd day of June, A. D. 1898; between The Keewatin Power Company, hereinafter called the Company of the First Part, and Her Majesty, represented herein by the Commissioner of Public Works, hereinafter caller the Commissioner, of the Second part.

"Whereas the Company have constructed a dam across the west branch of the Winnipeg River at Tunnel Island at or near the Lake of the Woods.

"And whereas for the purpose of improving the navigation of the said lake, it is expedient that the said dam should be improved by the addition of stop logs and otherwise.

"And whereas it has been agreed by and between the parties hereto that in consideration of the sum of Four Thousand Dollars and other stipulations and conditions herein contained, that the said Company will make all the necessary improvements and will also permit the same to be used for the improvement of such navigation as aforesaid.

Now this Indenture Witnesseth as follows:—

The Company further covenant and agree that the Commissioner shall have the right to regulate the height of the water and to control the dam as may be necessary."

2. Dominion Order in Council Establishing Lake of the Woods Control Board Dated January 21, 1919.

"The Minister, therefore, recommends that a Board, to be known as the 'Lake of the Woods Control Board' be constituted, to consist of four qualified civil engineers, two to represent the Dominion of Canada, and two to represent the province of Ontario.

"The powers and duties of the Lake of the Woods Control Board shall be:—

"(1) To see that all the works and all power canals in the outlet from the lake, including the headgates and by-passes,

shall be so operated as to maintain the level of the Lake of the Woods as nearly as may be, between 1056 and 1061, United States Coast and Geodetic Survey datum.

"(5) To from time to time confer with any municipalities, companies, bodies or persons affected by or interested in the regulation of the levels of the Lake of the
264 Woods respecting any matter arising from such regulation and to from time to time hear and receive any complaints, or representations from such municipalities, companies, bodies or persons respecting such regulation.

"(7) In addition to controlling the outflow for the maintenance of the level of the lake as set forth above, to cause the works to be so operated as to furnish the largest dependable flow of water from the lake to secure navigation in the Winnipeg River and to the advantage of the water powers of the Winnipeg River between Lake of the Woods and Lake Winnipeg and other interests both on the lake and in the Winnipeg River."

3. Ontario Order in Council establishing Lake of the Woods Control Board dated February 13, 1919.

"The Committee therefore advise that * * * be appointed to said Board to represent the Province of Ontario in compliance with the aforesaid Order of the Privy Council."

4. The Lake of the Woods Control Board Act, 1921. (Dominion).

Section 3. "It shall be the duty of the Board to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of the waters of the Winnipeg river; * * * and for these purposes the Board shall have power,—

"(a) To regulate and control the outflow of the waters of the Lake of the Woods so as to maintain the level of the lake between the elevations that have been recommended by the International Joint Commission in their final report of the 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada."

Section 4. "In addition to any other legal or other proceedings that may be taken to enforce any order of the said Board, every person violating or refusing to obey any order of the said Board, or obstructing or preventing the carrying out and enforcement of any order made by the said Board shall be liable, upon summary conviction, to a fine not

exceeding one thousand dollars, or to imprisonment for a period not exceeding three months, or to both such fine and imprisonment, and shall also be liable to a further penalty not exceeding five hundred dollars for each day on or during which any such offense continues or is repeated."

Section 5. "The said Board shall have all the powers necessary for effectively carrying out the authority and control vested in it by this Act and by any Act passed by the Legislature of the Province of Ontario, and any order
265 made by the said Board may be made a rule, order or decree of the Exchequer Court of Canada or of the Supreme Court of Ontario, and shall be enforced in the same manner as any rule, order or decree may be enforced in the Court in which such proceeding is taken.

Section 6. (1) When any person or corporation neglects or refuses to obey or carry out any order of the Board, the Board in addition to any other remedy provided by this Act, may from time to time enter upon and take such complete or partial possession of any mill, dam, plant, works, machinery, land, waters or premises, and may do all such acts and things, as the Board may deem necessary for the due enforcement and carrying out of such order, and may retain possession and control of any such mill, dam, plant, works, machinery, land, waters or premises for such period as the Board may deem necessary for that purpose.

(2) All expenses incurred by the Board under subsection one of this section shall constitute a debt due from such person or corporation to the Board and shall be recoverable by the Board with costs in any court of competent jurisdiction.

5. The Lake of the Woods Control Board Act. 1922. (Ontario)

Section 3. "It shall be the duty of the Board to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of the waters of the Winnipeg river; ..... and for these purposes the Board shall have power,—

"(a) To regulate and control the outflow of the waters of the Lake of the Woods so as to maintain the level of the lake between the elevations that have been recommended by the International Joint Commission in their final report of the 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada."

Section 4. "In addition to any other legal or other proceedings that may be taken to enforce any order of the said Board, every person violating or refusing to obey any order of the said Board, or obstructing or preventing the carrying out and enforcement of any order made by the said Board shall be liable, upon summary conviction, to a fine not exceeding $1,000, or to imprisonment for a period not exceeding three months, or to both such fine and imprisonment and to a further penalty not exceeding $500 for each day on or during which any such offense shall continue or be repeated."

Section 5. "The said Board shall have all the powers necessary for effectively carrying out the authority and control vested in it by this Act and by any Act passed by the Parliament of the Dominion of Canada and any order made by the said Board may be made a rule, order or decree of the Exchequer Court of Canada or of the Supreme Court of Ontario, and shall be enforced in the same manner as any rule, order or decree may be enforced in the court in which such proceeding is taken.

266 Section 6. (1) "Where any person or corporation neglects or refuses to obey or carry out any order of the Board, the Board in addition to any other remedy provided by this Act, may from time to time enter upon and take such complete or partial possession of any mill, dam, plant, works, machinery, land, waters or premises, and may do all such acts and things as the Board may deem necessary for the due enforcement and carrying out of such order, and may retain possession and control of any such mill, dam, plant, works, machinery, land, waters or premises for such period as the Board may deem necessary for that purpose.

(2) All expenses incurred by the Board under subsection 1 of this section shall constitute a debt due from such person or corporation to the Board, and shall be recoverable by the Board with costs in any court of competent jurisdiction."

6. The Lake of the Woods Regulation Act, 1921. (Dominion).

Section 2. "All dams, structures and other works of whatsoever description which have heretofore been or may hereafter be constructed in upon, over, about or across,—

(a) any outlet of the Lake of the Woods,

(b) the Winnipeg River at or above its junction with English River, or

(c) English River at the outlet of and below Lac Seul, which do or may or can in anywise control, regulate or affect the outflow of water from the said lakes, or either of them, or the natural levels of the water in the said lakes, or either of them, at any time, or the natural flow of the water in the Winnipeg River or in English River, at any time, are and each of them is declared to be for the general advantage of Canada.

Section 3 (1) "The Governor in Council shall have power to make and enforce such regulations as he may from time to time consider necessary, advisable or expedient to require, prescribe and ensure that the aforesaid works and each of them shall at all times be constructed, maintained, improved, repaired and operated in such manner as,—

(a) to secure at all times the most dependable flow and the most advantageous and beneficial use of the waters of the Winnipeg River and of the English River severally;

(b) to regulate and control the outflow of the waters of the Lake of the Woods so as to maintain the level of the said lake between the elevations recommended by the report of the International Joint Commission of 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada, and so that the obligations, relating to the level of the Lake of the Woods, of Canada, or any of the Provinces of Canada, as part of the British Dominions beyond the seas, toward the United States, arising out of treaty made or to be made between His Majesty the King of the United Kingdom of Great Britain and Ireland
267 and of the British Dominions beyond the seas, Emperor of India, and the United States, may be duly performed;"

Section 4. "Any person who owns, controls, or has in possession any of the dams, structures or works aforesaid, or who directs the construction, operation, repair, alteration or management thereof, shall if he contravene or fail, neglect or refuse to obey or comply with any of the regulations aforesaid, or any order, direction, or requirement competently made or issued and communicated to him thereunder, be guilty of an offense and liable therefor, upon summary conviction, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment: Provided that if the offender be a body corporate the fine may be for a sum not exceeding five

thousand dollars; and moreover, in either case, the offender shall be liable to a further penalty, not exceeding in the case of an individual five hundred dollars, and in the case of a body corporate two thousand dollars, for each day upon or during which any such offense shall continue or be repeated."

Section 5. Any person who wilfully resists, obstructs, hinders, or prevents, or attempts wilfully to resist, obstruct, hinder or prevent the carrying out or enforcement of any such regulation, shall be liable, upon summary conviction, to a fine not exceeding one thousand dollars, and to imprisonment for a term not exceeding three months, or to both such fine and imprisonment, and shall also be liable to a further penalty not exceeding five hundred dollars for each day upon or during which any such offense shall continue or be repeated."

Section 6. "Moreover the Exchequer Court of Canada shall have jurisdiction to enforce compliance with this Act, or with any regulation made thereunder, by appropriate judgment or order in any action brought upon information of the Attorney General of Canada against any person or body corporate from whom compliance is due, or who is charged with the obligation to comply, or who is by this Act or any such regulation made subject to a penalty for non-compliance."

Section 7. (1) "The Governor in Council shall have power to appoint a Board consisting of four members, of whom three shall form a quorum, and such inspectors and other officers and employees as he may deem necessary or advisable to aid in the administration and for the purpose of enforcing the provisions of this Act and any regulations made thereunder.

7. Dominion Order in Council, issued under authority of the Lake of the Woods Regulation Act, 1921, reappointing the four members of the original Lake of the Woods Control Board, dated September 21, 1921.

"The Minister, therefore, recommends that pursuant to the Lake of the Woods Regulation Act, 1921, the four
268 members of the original Board be reappointed in their present capacities, but in view of Clause 1 of Section 7 of the Lake of the Woods Regulation Act that three shall form a quorum of the Board, that provision only of the Order in Council dated 21st January, 1919, whereby the Chairman of the original Board had a casting vote in case of a tie be rescinded;

"The Minister further recommends that such Lake of the Woods Control Board shall be charged with the responsibility of,—

(a) The administration and enforcing of the provisions of the Lake of the Woods Regulation Act;

(b) The preparation for the approval of the Governor in Council of such regulations as the Board may from time to time consider necessary to carry out the provisions of the said Act."

8. The Lac Seul Conservation Act, 1928. (Dominion.)

Section 3. "The Lake of the Woods Regulation Act, 1921, chapter thirty-eight of the statutes of 1921, is repealed."

9. Proclamation of Governor in Council bringing into effect the Lake of the Woods Control Board Act, 1921, dated June 20, 1928.

"Now Therefore Know Ye that by and with the advice of Our Privy Council for Canada We do hereby proclaim and direct that the said the Lake of the Woods Control Board Act, 1921, shall come into force on the thirtieth day of June in the year of Our Lord one thousand nine hundred and twenty-eight."

10. Dominion Order in Council appointing the Dominion members of the Lake of the Woods Control Board under authority of the Lake of the Woods Control Board Act, 1921, dated June 20, 1928.

"The Minister, therefore, recommends that Mr. J. T. Johnston, Director of the Dominion Water Power and Reclamation Service of the Department of the Interior, and Mr. K. M. Cameron, Chief Engineer, of the Department of Public Works, be appointed Dominion members of the Lake of the Woods Control Board, as from June 30, 1928; that their positions on the Board continue to be as set out in the Order in Council of May 19, 1925, (P. C. 729), by which they were designated Dominion members of the Board under the authority of the Lake of the Woods Regulation Act, 1921, (to be repealed as above stated on the date of their new appointment); and that their duties and responsibilities as members of the Board be as set out,—

269 (a) in the Lake of the Woods Control Board Act, 1921, including the preparation for the approval of the Governor General in Council and the Lieutenant Gov-

ernor in Council, of such regulations as the Board may from time to time consider necessary to carry out the provisions of the said Act as provided in section 10 thereof."

11. Ontario Order in Council appointing the Ontario members of the Lake of the Woods Control Board under authority of the Lake of the Woods Control Board Act, 1922, dated June 27, 1928.

"The Minister recommends that Thomas Henry Hogg, of the City of Toronto, of the County of York, Chief Hydraulic Engineer of the Hydro-Electric Power Commission of Ontario, and Louis Valentine Rorke of the said City of Toronto, of the County of York, Surveyor-General of the Department of Lands and Forests, be appointed as Members, representing the Province of Ontario, of the Lake of the Woods Control Board as and from June 30th, 1928, with duties and responsibilities as set out in the said Lake of the Woods Control Board Act, 1922, including the preparation for approval of such regulations as the Board may, from time to time, consider necessary to carry out the provisions of the said Act as provided therein, and as provided for by the Lac Seul Conservation Act, 1928."

12. Lake of the Woods Convention signed February 24, 1925.

Article 3. "The Government of Canada shall establish and maintain a Canadian Lake of the Woods Control Board, composed of engineers, which shall regulate and control the outflow of the waters of the Lake of the Woods.

There shall be established and maintained an International Lake of the Woods Control Board composed of two engineers, one appointed by the Government of Canada and one by the Government of the United States from their respective public services, and whenever the level of the lake rises above elevation 1061 sea-level datum or falls below elevation 1056 sea-level datum the rate of total discharge of water from the lake shall be subject to the approval of this Board."

270 Government Exhibit No. 65.

Certified Exhibits
to Accompany
Supplement to Division VII
of
Canada's Representation

271 List of Exhibits.

Supplement to Division VII.

Number.

Agreements of Dec. 11, 1924, between Keewatin Power Company and the Minister of the Interior of Canada.

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272 Supplement to Division VII.

Control Over Outlets.

As a supplement to the contentions made in the argument presented under Division VII immediately preceding, and as indicating further how drastically the Dominion Government insisted upon retaining control over the lake outlets, reference might be made to the agreement entered into between His Majesty the King represented by the Minister of the Interior of the Dominion Government, and the Keewatin Power Company, dated December 11, 1924, covering the reconstruction of the Norman Dam, the construction of the power station located in and forming part of the dam, and the enlargement of the Western Outlet, all by the Keewatin Power Company in accordance with plans approved by the Dominion Government and with the Dominion Government contributing towards the cost of the outlets enlargement and of the reconstruction of the control dam.

The Government insisted upon control of the works either by the control board or by an officer of the Department and incorporated ample provisions for enforcing such control.

Paragraph 52 (a) of the Agreement provided that the Contractor covenants and agrees that "the Minister shall by means of the Lake of the Woods Control Board or by any officer of the Department of the Interior or of the Board ..... at all times in the future control and operate the works as hereinafter defined for the purpose of securing to the public the most dependable flow and the most advantage-

ous use of the waters of the Winnipeg River, and for the regulation and control of the outflow of the waters of Lake of the Woods so as to maintain the level of the said lake between the elevations recommended by the report of the International Joint Commission of the 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada so that any obligations relating to
273 the level of Lake of the Woods, of Canada or of any of the Provinces of Canada as part of the British Dominions beyond the seas, towards the United States, arising out of treaty made or to be made between His Majesty and the United States may be duly performed; and the Minister or the Lake of the Woods Control Board as the case may be shall be the sole judge of what is necessary to be done for the purposes aforesaid."

Paragraph 52 (b) provided that "The Contractor further covenants and agrees that the control exercisable by the Minister as hereinbefore provided shall be exclusive and that its right to use water for the development of power and to utilize the works and the power-house proposed to be constructed thereon shall be subject to the right of the Minister to control for the purposes aforesaid, and that for the purposes of such control the Minister may do any thing relating to the construction, operation and improvement of the works, as may in his judgment be necessary or proper for the purposes hereof, and the Contractor covenants and agrees to facilitate the Minister in all respects in the exercise of such control and in the doing of anything relating to the construction, operation and improvement of the works aforesaid."

Paragraph 52 (c) provided that "The Contractor further covenants that it has a good and indefeasible title to the works and that it is entitled to grant, and does hereby grant, to His Majesty for the purposes of control and all other powers and authority vested in the Minister or to which he is entitled, a license and easement for access to and to enter upon all and singular, that certain parcel or tract of land and premises, situate, lying and being in the vicinity of the Town of Kenora, District of Kenora, and Province of Ontario, and being composed of the land and lands under the water of the West Branch of the Winnipeg River, South of Tunnel Island,

and containing by admeasurement, twelve (12) acres,
274 be the same more or less, and which said parcel of land may be more particularly described as follows."

From the foregoing it will be noted that the Dominion Government—not content with the sanctions embodied in the Lake of the Woods Control Board Acts 1921 and 1922 ("Concurrent legislation)—further embodied in the agreement entered into with the Keewatin Power Company for the actual enlargement of the Western Outlet and for the reconstruction of the Norman Control Dam, the following express conditions:

1. That the Minister shall by means of the Lake of the Woods Control Board or by any officer of the Department of the Interior, at all times in the future control and operate the works as defined (i. e. both the control dam and the power house) for the purpose of securing to the public the most dependable flow and the most advantageous use of the waters of the Winnipeg River, etc., etc.

2. That the control by the Minister shall be exclusive and that the company's rights to use water for the development of power and to use the works and the power house shall be subject to the right of the Minister to control the flow for the purposes aforesaid.

3. That the Minister is granted, for the purposes of control, a license and easement for access to the lands and premises upon which the works are located.

It might be added that by a supplementary agreement between His Majesty and the Keewatin Power Company, also dated December 11, 1924, exactly similar provisions were agreed upon governing the control of the Company's power plant in the Eastern Outlet and of the flow of the water through the same.

275 It is apparent therefore that in the two agreements entered into between His Majesty and the Keewatin Power Company having to do with the two structures controlling the outflow through the Western and Eastern Outlets of the lake respectively (i. e. the outlets through which the outflow is 95% controlled) the use of water for power purposes was completely subordinated to the maintenance of a regulated flow "designed for securing to the public the most dependable flow and most advantageous use of the waters of the Winnipeg River."

A certified copy of the Agreement between His Majesty and the Keewatin Power Company dated 11th December, 1924, covering the Western Outlet is submitted as Exhibit #65.

A certified copy of the Agreement between His Majesty and the Keewatin Power Company, dated 11th December 1924, covering the Eastern Outlet is submitted as Exhibit #65.

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276 Government Exhibit No. 66.

Certified Exhibits to Accompany Division VIII. of Canada's Representation.

277 List of Exhibits.

Division VIII.

Number

Dominion Lands Act

Letters, J. B. Challies to Deputy Minister, dated Sept. 1, 1915.
Agent of Dominion Lands to J. B. Challies, dated Sept. 21, 1915.
J. B. Challies to N. O. Cote, dated Feb. 24, 1916.
F. S. Checkley to J. B. Challies, dated April 7, 1916.

Dominion Order in Council of March 27, 1922.

Ontario Public Lands Act.

Letters, J. B. Challies to Beniah Bowman, dated Nov. 24, 1920.
Beniah Bowman to J. B. Challies, dated Nov. 30, 1920.
L. V. Rorke to J. T. Johnston, dated Nov. 27, 1929.

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278 Division VIII.

Large tracts of Canadian Lands were withdrawn from acquisition by private parties beginning 1915.

Extracts from Pertinent Acts &c.

1. Dominion Lands Act. (Dominion) (ch. 113 R. S. C. 1927)

Section 78. "The Minister may set aside and reserve from entry for homestead or from sale as agricultural lands, any

lands which he considers to be unsuited for cultivation without the aid of irrigation, or to be required in connection with out the aid of irrigation, or any marsh lands, or lands suitable for grazing but not adapted to agriculture, or lands valuable on account of the hay or timber, quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron, or other minerals thereon or therein, or for the protection of ponds, lakes or other water supplies, or for the purposes of a water power, harbour, landing or townsite: Provided that the Minister may, at any time, on being satisfied that there is no longer reason for continuing the reservation of any lands so reserved, after due notice given, remove the reservation and declare the land open to entry for homestead or for sale as agricultural lands."

2. Letter from J. B. Challies to the Deputy Minister, dated September 1, 1915.

"In connection with the consideration by the Lake of the Woods Technical Board of the Lake of the Woods Reference before the International Joint Commission, the question has arisen as to the advisability of the Department of the Interior allowing settlement in available land in the Province of Manitoba, contiguous to the Lake of the Woods.

"As it is possible that the level of the Lake of the Woods will be held at an elevation which will cause considerable flooding along the margins of this Lake in the Province of Manitoba, it is urgent that the damage caused thereby should be as low as possible. If the territory in question is allowed to be homesteaded, it might be necessary to pay considerable sums for land improvements. I have therefore been requested to suggest that the Department of the Interior might reserve the area in question from homestead entry or other disposition for a year, or until the Lake of the Woods Reference before the International Joint Commission has been disposed of.

"The attached sketch shows the land along the margins of the Lake in the Province of Manitoba that might reasonably be expected to be affected.

"I have been requested to submit the situation for your consideration, and to respectfully suggest that the reservation suggested by the Board be put in force at the earliest possible date."

279 3. Letters from Agent of Dominion Lands at Winnipeg to J. B. Challies, dated September 21, 1915.

"I beg to acknowledge the receipt of yours of the 11th inst., reference 6815-W., enclosing a memorandum of lands in the vicinity of the Lake of the Woods, which you requested to be reserved from entry, for water power purposes, and in reply I beg to state I have made a check of the records and have reserved all the lands which are available. I am enclosing you a list of lands, showing the lands which have been disposed of in several Townships."

4. Memorandum from J. B. Challies to N. O. Cote, dated February 24, 1916.

"On September 11th last I submitted a schedule of lands in Manitoba bordering on the Lake of the Woods, requesting that you report on the standing of these lands and note File 6815-W against those sections still vacant. This was duly done.

"Some three weeks later, for a somewhat different purpose, your branch was asked to report on certain townships in the above mentioned locality and consequently such sections in these townships, which were included in the former schedule, should have had File 6815-W noted against them. I note, however, that in certain cases the land was reported as vacant. I am bringing this to your attention in order to be sure that the reservation is correctly noted. The following parcels reported as vacant on September 30th last should have File 6815-W. P. noted against them.

All 20-1-17 E. (Fractional).

L. S. 13-2-16 E. (and not L. S. 11.)

E. ½ Sec. 12-2-16E.

Frl. N. W. ¼ 17-2-17E."

5. Letter from F. S. Checkley to J. B. Challies, dated April 7, 1916.

"I beg to acknowledge the receipt of your letter of the 24th of February, your files 6815-W, and 2410-W, in regard to the reservation of certain School Lands bordering on the Lake of the Woods, and in reply to say that a temporary reservation has been made of the School Lands mentioned in that letter."

6. Dominion Order in Council reserving lands affected by recommendations of the International Joint Commission, dated March 27, 1922.

"Whereas in the report dated 12th June, 1917, of the International Joint Commission with respect to the levels of Lake of the Woods it is recommended among other things that flowage rights should be secured up to contour 1064 sea level datum on all lands bordering on Lake of the Woods; and that Canada should acquire and hold in perpetuity for this purpose the necessary lands on the Canadian side of the boundary;

280 "And whereas His Excellency the Governor in Council did by Order in Council of the 17th July, 1919, accept and approve of the recommendations of the International Joint Commission in the above matters, copy of which Order in Council was transmitted to the Government of the United States under cover of a despatch dated the 21st July, 1919;

"And whereas certain of the necessary lands on the Canadian side of the boundary are Dominion Lands or School Lands which it is, therefore, desirable to place under definite reservation;

"Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Interior, is pleased to order and it is hereby ordered as follows:

1. "All the lands affected as set out in Schedule "A" hereto which are Dominion Lands are hereby reserved, and any other lands in the said Schedule "A" which may later come under the control of the Crown in the right of the Dominion of Canada shall thereupon be reserved from any disposition inconsistent with the requirements in connection with the regulation of the Lake of the Woods as set forth in the above mentioned Order in Council.

2. "All the School Lands affected as set forth in Schedule "B" hereto, shall be similarly reserved as soon as other available Dominion Lands have been selected in lieu thereof as provided in Section 39, sub-section 2 of the Dominion Lands Act."

7. Ontario Public Lands Act. (ch. 35 R. S. O. 192).

Section 60. "In all sales, free grant locations, leases, licenses of occupation, mining claims and other dispositions of public lands, or mining lands or mining rights the Minister may reserve from sale any water power or privilege, and such area of land in connection therewith as he may deem necessary, for the erection of building and plant, and the development and utilization of the power, together with the right to

lay out and use such roads as may be necessary for passage to and from such water power or privilege and land, and may, with the approval of the Lieutenant-Governor in Council, fix the terms and conditions upon which such water power or privilege and land may be sold or leased and developed."

8. Letter from J. B. Challies to Hon. Beniah Bowman, dated November 24, 1920.

"At a meeting of Lake of the Woods Control Board on 4th November, it was resolved that your attention be re-
281 spectfully drawn to the recommendations of the International Joint Commission with reference to the reservation of flowage easements over riparian public lands around all larger lakes in the Lake of the Woods watershed.

"In this connection I would refer you to page 35 of International Joint Commission final report on Lake of the Woods Reference, wherein it is recommended,—'It further believes that, as far as possible, the two Governments, respectively, should reserve a flowage easement over all public raparian lands around the larger lakes on the watersheds in both countries to an elevation of at least 5 feet above extreme natural high water mark or to such other elevation as after investigation they may agree upon.'

"Other than the general recommendation, a specific recommendation is made that a flowage easement on the shores of Lake of the Woods be retained to elevation 1064 sea level datum, Rainy Lake to elevation 501, D. P. W. Datum and Namakan Lake to elevation 516 D. P. W. Datum.

"Pursuant to the above recommendations reservations have been made of the riparian lands in Manitoba around Lake of the Woods under the jurisdiction of the Dominion Government. Of the remaining riparian lands in Canada jurisdiction and control is vested in the Province of Ontario and it is the opinion of the Board that action should be taken by the Province to reserve the necessary flowage rights."

9. Letter from Hon. Beniah Bowman to J. B. Challies, dated November 30, 1920.

"I have before me your letter of the 24th inst. in which a request is made that a flowage easement over Crown Lands adjoining the larger lakes on the Rainy River and Lake of the Woods water-shed be reserved to five feet above high water mark on the larger lakes and a special reservation to sea level elevation 1064 adjoining Lake of the Woods and to

Dominion Public Works datum of 501 and 516 adjoining Rainy Lake and Namakan Lake respectively.

"I have requested the Engineering and Surveying Branch to look into this matter and am advised that in view of the benefit which will accrue to the water power development in the country, the recommendation of the International Joint Commission in this respect should be acted upon.

"I am giving instructions that in the disposal of all Crown Lands adjoining the above mentioned lakes a reservation of flooding rights should be made as suggested."

282 10. Letter from L. V. Rorke to J. T. Johnston, dated November 27, 1929.

"Referring to our conversation yesterday in reference to the action which has been taken in this Department regarding a reservation of flooding rights over Crown land along the shores of Lake of the Woods, Rainy Lake and Namakan Lake, referred to in the letter of the Honorable, the Minister of Lands and Forests, dated November 30th, 1920, I have to say that the instructions to make such reservation have been carried out in the disposal of Crown lands along the shores of these Lakes since that date."

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283 Government Exhibit No. 67.

Certified Exhibits to Accompany Division VIII-A of Canada's Representation.

284 List of Exhibits.

Division VIII-A.

Number.

Electricity and Fluid Exportation Act.

Regulations under the Electricity and Fluid Exportation Act.

Dominion Water Power Act.

Regulations under the Dominion Water Power Act.

Resolution of the House of Commons of Canada, dated June 15, 1925.

Manitoba Water Power Act.

Proclamation bringing into force the Manitoba Water Power Act.

Letter from Hon. Wm. Finlayson to Hon. Charles Stewart, dated Nov. 30, 1929.

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285 Division VIII-A.

The Export of Power Opposed by Canada.

Extracts from Pertinent Acts, &c.

1. The Electricity and Fluid Exportation Act. (C. 54, R. S. C. 1927.)

Section 5. "No person shall export any power or fluid without a license, or any power or fluid in excess of the quantity permitted by his license, or otherwise than as permitted by such license.

2. No person shall, without a license, construct or place in position any line of wire or other conductor for the exportation of power, or any pipe line or other like contrivance for the exportation of fluid."

2. Regulations established under the Authority of the Electricity and Fluid Exportation Act by Order in Council dated November 4, 1907.

2. "Before commencing to supply any electrical energy, gas or fluid for exportation, the contractor shall obtain from the Department a license in respect of such exportation, the application for which license shall contain full and exact information as to the quantities proposed to be exported from Canada."

3. "The contractor shall, on or before the 1st day of April of each year, make application for the license referred to in the previous paragraph and shall pay therefor the following fee, namely: * * *"

4. "Any license issued hereunder shall be revocable at will by the Governor in Council if the licensee refuses or neglects to comply with any of the conditions from time to time imposed by the Governor in Council with regard to the supply and distribution of electrical energy, gas or fluid in Canada, and moreover, whenever such electrical energy, gas or fluid is required for the use of purchasers in Canada, any such license shall be revocable upon such notice to the licensee as the Governor in Council deems reasonable in each case."

3. Dominion Water Power Regulations.

Section 71. "No hydro-electric energy developed under the authority of these regulations shall be exported from Canada without the consent of the Minister and subject to such conditions as the Governor in Council may impose."

4. Resolution of the House of Commons of Canada, dated June 15, 1925.

"That in the opinion of this House export of hydro electric power from Canada should be permitted only on yearly license, and that hereafter no license for export of power beyond that already granted should be issued except with the concurrence of the province or provinces in which it is proposed to develop such power and of any other province adjacent to such development and interested therein."

286 5. Manitoba Water Power Act.

"The Water Power Act, Chapter 46, Statutes of Manitoba, 1930.

Section 7 (3). "There shall be implied in every permit, license, lease or other concession granted by the Crown under this Act, or the regulations, for any interest in water power or land required or necessary for the creation, protection or development thereof in addition to such other provisions as are contained in the regulations or in the conditions under which the permit, license, lease or other concession was disposed of a provision binding the permittee, licensee, or lessee

(a) that no power generated in Manitoba from any Provincial water power shall be exported across the international boundary."

6. Letter from Ontario Minister of Lands and Forests to the Minister of the Interior, dated November 30, 1929.

"I have your letter of the 26th instant, and note what you say in reference to the question that has arisen before the District Court of the United States for the District of Minnesota in connection with the condemnation of certain lands on the shore of the Lake-of-the-Woods required for storage purposes.

It has been the fixed policy of the Ontario Government for some years not to permit the export of power from hydro electric developments under the control of the Province.

There are, of course, a very few cases in which power has been exported for a considerable number of years, and it has not been thought wise to interfere with these, but no new export has been allowed for a number of years, and the policy of the Province is very much against this.

The representatives of your Department are quite at liberty to use this letter, but if you would like this assurance in any other form I will be glad to see if we can meet your wishes."

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287 Government Exhibit No. 68.

Certified Exhibits to Accompany Division XII of Canada's Representation.

288 List of Exhibits.

Division XII.

Number

Boundary Water Treaty of 1909.

The International Boundary Waters Treaty Act.

Dispatches between Canadian and United States governments, April 24, 1919, to April 19, 1922.

Lake of the Woods Convention of 1925.

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289 Division XII.

International Commitments make independent action by Private Interests impossible.

Extracts from Pertinent Acts &c.

1. Boundary Waters Treaty signed January 11, 1909.

Preliminary Article. "For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary."

Article III. "It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or here-

after provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada, within their respective jurisdictions and with the approval as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of break-waters, the improvement of harbours, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes."

Article VIII. "The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

(1) Uses for domestic and sanitary purposes;

(2) Uses for navigation, including the service of canals for the purposes of navigation;

(3) Uses for power and for irrigation purposes."

290 Article IX. "The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government."

2. An Act relating to the Establishment and Expenses of the International Joint Commission under the Waterways Treaty of January the eleventh, 1909, (1-2 George V. C. 28).

Section 2. "The laws of Canada and of the several Provinces thereof are hereby amended and altered so as to permit, authorize, and sanction the performance of the obligations undertaken by His Majesty in and under the said treaty; and so as to sanction, confer, and impose the various rights, duties and disabilities intended by the said treaty to be conferred or imposed or to exist within Canada."

3. Identical letters of reference on behalf of the Governments of the United States and Canada, dated June 27, 1912.

"The questions so referred are as follows, namely:

291 (1) In order to secure the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbors of the lake and

of the waters flowing into and from the lake, is it practicable and desirable to maintain the surface of the lake during the different seasons of the year at a certain stated level, and if so at what level?

(2) If a certain stated level is recommended in answer to question No. 1, and if such level is higher than the normal or natural level of the lake, to what extent, if at all, would the lake, when maintained at such level, overflow the low lands upon its southern border, or elsewhere on its border, and what is the value of the lands which would be submerged?

(3) In what way or manner, including the construction and operation of dams or other works at the outlets and inlets of the lake, or in the waters which are directly or indirectly tributary to the lake, or otherwise, is it possible and advisable to regulate the volume, use, and outflow of the waters of the lake so as to maintain the level recommended in answer to question 1, and by what means or arrangement can the proper construction and operation of regulating works, or a system or method of regulation, be best secured and maintained in order to insure the adequate protection and development of all the interests involved on both sides of the boundary, with the least possible damage to all rights and interests, both public and private, which may be affected by maintaining the proposed level?"

4. International Correspondence between the Two Governments.

This correspondence will be found in full in a separate Exhibit.

5. Lake of the Woods Convention (1925).

Preamble. "His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada, and the United States of America,

Desiring to regulate the level of Lake of the Woods in order to secure to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries; and

292 Accepting as a basis of agreement the recommendations made by the International Joint Commission in its final report of May 18, 1917, on the Reference concerning

Lake of the Woods submitted to it by the Governments of Canada and the United States of America,

Have resolved to conclude a Conventon for that purpose and have accordingly named as their plenipotentiaries:—"

Article 4. "The level of Lake of the Woods shall ordinarily be maintained between elevation 1056 and 1061.25 sea-level datum, and between these two elevations the regulations shall be such as to ensure the highest continuous uniform discharge of water from the lake.

During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea-level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062.5 sea-level datum.

The level of the lake shall at no time be reduced below elevation 1056 sea-level datum except during periods of low precipitation and then only upon the approval of the International Lake of the Woods Control Board and subject to such conditions and limitations as may be necessary to protect the use of the waters of the lake for domestic, sanitary, navigation and fishing purposes."

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293 Government Exhibit No. 69.

Certified Exhibits to Accompany Division XIII of Canada's Representation

294 List of Exhibits.

Division XIII.

Number.

Map showing number and location of Indian reserves bordering on Lake of the Woods in Canada.

Indian Act.

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295 Division XIII.

The flowage of Indian lands by Private Parties difficult.

Extracts From Pertinent Acts.

Indian lands may be acquired only by direct action of the Canadian Government.

The Indian Act, (Dominion) (Ch. 98 R. S. C. 1927).

Section 50. "Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; but the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber."

Section 51. "Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General."

Section 54. "All Indian lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part."

26
showing
Chief Surveyor
Dept. of Indian Affairs
Deputy
of Indian Affairs.
Amherst Peninsula

297 General Government's Exhibit 97.

"Adolph F. Meyer

Member American Society of Civil Engineers
Member American Society of Mechanical Engineers
Consulting Hydraulic Engineer
628 Metropolitan Bank Building,
Minneapolis, Minnesota.

February 2nd, 1931.

Mr. I. K. Lewis,
Ryan Hotel,
Saint Paul, Minnesota.

Dear Mr. Lewis:

Mr. Harries has called my attention to one statement in the offer of proof which I evidently inadvertently overlooked. It refers to the impossibility of utilizing the storage possibilities of the Lake of the Woods reservoir without flooding the lands on the South shore in Minnesota.

The facts are that, inasmuch as the interests of navigation in both countries and summer resort interests in the Northern portion of the Lake of the Woods could not have been reasonably satisfied by utilizing a five and one-half foot storage range below elevation 1059, it would have been necessary to flood the lands on the South shore of the Lake in order to secure the same storage range above levels satisfactory to navigation and summer resort interests.

Yours very truly,

ADOLPH F. MEYER."

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298 Order Allowing Proposed Amendments of Bill of Exceptions.

In the District Court of the United States for the District of Minneota, Fifth Division.

Upon Removal From the Sixth Division, District of Minnesota (Law 539).

United States of America, Petitioner,
1549. vs. Law.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner, and of Harry Brewster, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 247, 248, 252, as set forth in said award.

In the matter of the Appeal of United States of America, Petitioner, and of Randor G. Karlson, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86 and 87, as set forth in the said award.

In the matter of the Appeal of United States of America, Petitioner and of Elias A. Olson, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

The United States, appellee herein, having proposed the following amendments of the Bill of Exceptions presented by the appellant, these amendments were considered by the Court in chambers at St. Paul, July 30, 1931. Each party appeared by counsel. And the Court being of the opinion that the proposed amendments are necessary to present clearly the questions of law involved in the rulings to which exceptions are preserved.

It Is Ordered, that the Bill of Exceptions presented by the appellant be and it hereby is amended as follows:

1. By adding to such Bill of Exceptions the annexed
299 portions of the stenographer's minutes of proceedings upon the trial of said cause, condensed in narrative form, save as a proper understanding of the questions presented may require that parts be set forth in the manner and form of the attached transcript, which the Court hereby approves and directs the Clerk to employ.

2. By adding to said Bill of Exceptions the following original Exhibits, received in evidence and on file in the office of the Clerk of this Court at Duluth, Minnesota; said original exhibits to be embodied in said Bill of Exceptions by reference, with the same effect as though reproduced therein:

1—Government exhibit numbered 4—The watershed map of the Lake of the Woods accompanying report of engineers to the International Joint Commission relating to the investi-

gation of the levels of the Lake of the Woods and tributary waters.

2—Government exhibit numbered 3—Map of lands in affected easement zone prepared by the Corps of Engineers of the United States Army under date of March 1, 1927.

3—Government exhibit numbered 2—Map of Lake of the Woods and surrounding territory indicating governmental subdivisions.

4—Government exhibit numbered 9—House of Representatives Executive Document numbered 247, 51st Congress, First Session (1 Volume).

5—Government exhibit numbered 10—Certificate of William Tyler Page, clerk of the House of Representatives, that government exhibit numbered 9 (H. R. Executive Document 247) is correct excepting as noted in memorandum attached to certificate.

6—Government exhibit numbered 11—True copy of original maps and text of the 18th Annual Report of the Bureau of American Ethnology, certified by Acting Commissioner of Indian Affairs, January 17, 1931.

7—Government exhibits numbered 13 to 17 inclusive—Certified copies of applications for homestead entry made by the appellants or their predecessors in title.

8—Government exhibit numbered 21—True copies of original maps as the same appear in the Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the fiscal years ending June 30, 1888, 1889 and 1890, certified by Acting Commissioner of Indian Affairs.

9—Government exhibit numbered 22—Photostatic copies of Rand McNally & Company's maps registered for copyright February 7 and February 17, 1888, certified by Acting Assistant Registrar of Copyrights, January 21, 1931.

10—Government exhibit numbered 23—Photostatic copies of Rand McNally & Company's maps registered for copyright July 23, 1888 and August 13, 1888, certified by Acting Assistant Registrar of Copyrights.

11—Government exhibit numbered 24—Atlas to accompany report of consulting engineers to the International Joint Commission relating to official reference re Lake of the Woods levels.

12—Government exhibit numbered 26, Copy of executive order withdrawing certain lands from homestead entry dated April 28, 1928, certified by Henry L. Stimson, Secretary of State, by his Chief Clerk.

13—Government exhibit numbered 27—Copy of executive order withdrawing certain lands from homestead entry, dated January 14, 1929, certified by Henry L. Stimson, Secretary of State, by his Chief Clerk.

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14—Government exhibits numbered 28 to 54, inclusive,—excepting however government exhibits numbered 33, 40 and 50, of which copies are being transmitted, the said exhibits being certified copies of deeds of land in the area affected by these proceedings.

15—Government exhibits numbered 60 to 69, inclusive, the same being respectively designated as the following: Representations of Canada, Divisions I, II, V, VI, VII, Supplement to Division VII, VIII, VIIIA, XII and XIII.

16—Government exhibit numbered 71—Final Report of the International Joint Commission on the Lake of the Woods Reference.

17—Government exhibit numbered 94—Township map of a portion of Roseau County.

18—Government exhibit numbered 95—Township map of a portion of Lake of the Woods County.

19—Government exhibit numbered 96—Report of the Bureau of Census for 1930, showing the population of Townships of Lake of the Woods County bordering on the Lake of the Woods at pages 17 and 18; and the population of Townships in Roseau County bordering on the Lake of the Woods at page 25.

20—Government exhibit numbered 110—Certified copy of deed conveying flowage rights to the United States, dated April 5, 1928, Lewes Anensen and Regina Anensen, grantors.

21—Government exhibit numbered 113—Certified copy of deed conveying flowage rights to the United States dated August 27, 1928, Ole O. Lillevig and Bertine Lillevig, grantors.

22—Government exhibit numbered 114—Certified copy of deed conveying flowage rights to the United States dated May 28, 1928, Lars Engstrom and Karin Engstrom, grantors.

3. By adding to said Bill of Exceptions copies of the following exhibits, received in evidence and on file in the office of the Clerk of this Court at Duluth, Minnesota:

1—Government exhibit numbered 3—Map of lands in affected easement zone showing classes of ownership prepared by the Corps of Engineers of the United States Army, dated March 1, 1927.

1a—Government exhibit numbered 11—Map No. 35 (PL. CXL 11) of 18th Annual Report, Bureau American Ethnology showing Indian Land Cessions in the United States; ceded portion shown in blue tint; and accompanying text.

2—Government exhibit numbered 12—Homestead Entry application of Elias A. Olson and other papers certified by Acting Assistant Commissioner, General Land Office, as filed under Cass Lake number 013,608.

3—Government exhibit numbered 18—Certificate of the Register of the United States Land Office at Cass Lake, Minnesota, dated January 15, 1931.

4—Government exhibit numbered 19—The following portions of certificate of the Register of the United States Land Office at Cass Lake, Minnesota, dated January 7, 1931: Paragraph numbered 3 of said certificate.

301 5—Government exhibit numbered 25—Table to accompany report to Chief of Engineers, January 2, 1931.

6—Government exhibit numbered 29—Deed from Lloyd Henry Harrison to Harry Brewster dated February 14, 1923.

7—Government exhibit numbered 33—Deed from Richard C. Edwards and Edith V. Edwards, to John R. Morris and William F. Steffes, dated August 18, 1915.

8—Government exhibit numbered 40—Deed from Andrew Johnson as administrator, to Andreas Strandenas, dated June 6, 1925.

9—Government exhibit numbered 50—Deed from Alfred F. Green, single, to Randor G. Karlson, dated August 10, 1921.

10—Government exhibit numbered 60 (cover page and entire contents of exhibit).

11—The following portions of government exhibit numbered 61:

a. Cover page.

b. List of exhibits division II.

c. Extract from pertinent Acts, received and filed as part of government exhibit 61.

12—The following portions of government exhibit numbered 62:

a. Cover page.

b. List of exhibits, division V:

c. Extracts from pertinent Acts, received and filed as part of government exhibit numbered 62.

13—The following portions of government exhibit numbered 63:

a. Cover page.

b. List of exhibits, division VI.

c. Extracts from pertinent Acts received and filed as part of government exhibit numbered 63.

14—The following portions of government exhibit numbered 64:

a. Cover page.

b. List of exhibits, division VII.

c. Extracts from pertinent agreements and Acts &c, received and filed as part of government exhibit numbered 64.

15—The following portions of government exhibit numbered 65:

a. Cover page.

b. List of exhibits (supplement to division VII).

c. Typewritten sheets designated, supplement to division VII, received and filed as part of government exhibit numbered 65.

16—The following portions of government exhibit numbered 66:

a. Cover page.

b. List of exhibits, division VIII.

c. Extracts from pertinent acts, received and filed as part of government exhibit numbered 66.

17—The following portions of government exhibit numbered 67:

a. Cover page.

b. List of exhibits, division VIIIA.

c. Extracts from pertinent Acts &c, received and filed as part of government exhibit numbered 67.

18—Government exhibit numbered 68, omitting the convention and protocol between His Britannic Majesty in respect of the Dominion of Canada and the United States, signed at Washington the 24th day of February, 1925, and omitting all other parts of said exhibit (the originals having been transmitted) except (a) cover page (b) list of exhibits (c) extract from pertinent acts.

382 19—The following portions of government exhibit 69:

a. Cover page.

b. List of exhibits, division XIII.

c. Extracts from pertinent acts, received and filed as part of government exhibit numbered 69.

d. Map showing Indian Lands in Canada bordering on Lake of the Woods.

20—Government exhibit numbered 97—Letter written by Adolph F. Meyer under date of February 2, 1931.

4. By adding the following statement of the Court to said Bill of Exceptions at the point where it recites (on page 92, line 1-4 of the typewritten proposed Bill of Exceptions) that the testimony of William Rulien was ordered stricken by the Court:—

R. T.
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"If there is any other evidence that you think the Court should have, outside of the testimony which this witness which you are putting on now, will testify to,—I presume these witnesses are going to testify to their having made purchases of land below 1064 with the idea that they had a greater value than other lands up there on account of their use for reservoir purposes—of course I could receive that."

5. By adding to said Bill of Exceptions the original of the written objections presented by counsel for the Dominion of Canada in opposition to the admission of evidence of the value of respondents' lands for reservoir purposes; such

written objections to be transmitted to the Clerk of the Circuit Court at St. Louis and incorporated in this Bill of Exceptions by reference as fully as if reproduced herein.

6. By striking from the Bill of Exceptions proposed by appellant the word in parenthesis and inserting the words underlined in the following portion of said proposed Bill at line 30 on page 2 of the typewritten transcript thereof:

".....the appeals involved herein arise out of condemnation proceedings brought by the United States to (condemn) acquire by such condemnation proceedings a flowage easement up to contour 1064....."

7. By adding after the last sentence of the testimony of the witness Meyer on page 5, lines 4-5 of the typewritten transcript of appellant's proposed Bill of Exceptions

303 By Mr. Harries:

Q. Mr. Meyer, in speaking of the use to which the lands are to be put, and making a comparison of the values of such uses, do you have in mind the market value, or the value of the use, or what I might call the utility value, or the economic value, or could you explain that to us?

A. I have in mind the use-value of the land.

8. By adding at the end of line 32 on page 5 of the typewritten transcript of appellant's proposed Bill of Exceptions the words underlined in the following sentence:

Mr. Meyer testified also that so far as he knows no flowage easements have been bought or sold on the Lake of the Woods as flowage easements.

9. By striking from said bill of exceptions, as proposed by appellant, the second paragraph comprised in lines 7 to 11, inclusive, of page 6 of the typewritten transcript of such proposed Bill of Exceptions and in lieu thereof reciting that the following proceedings took place:

Bernhard A. Arnesen was called as a witness on behalf of the respondents. Immediately after this witness was sworn the government counsel asked leave of court to state the government's objection to the testimony previously sought to be adduced by respondent and which the government anticipated would be supported by cumulative testimony of this witness relating to reservoir values of lands on the shores of the Lake of the Woods. The court granted government counsel permission to state the government's ob-

jections to such testimony and they were set before the court by the following proceedings:

By Mr. Harries:

The Government of the United States objects to the admission of any evidence concerning any of the following:

1. The availability of respondents' lands as part of the reservoir contemplated under the treaty between the United States and Canada.

2. The uses and benefits of storage of water in the Lake of the Woods.

3. Water power sites on the Winnipeg River or elsewhere.

4. Values of respondents' lands based upon their use in whole or in part as a part of such storage basin.

5. The anticipation of buyers of shore lands that reservoir uses ever had enhanced or ever would enhance the value of their lands.

In connection with the foregoing objection government counsel stated 35 grounds for such objections. These
304 grounds of objection are set forth, herein at page ....., line to page ....., line ....., (page 10, line 1, page 16, line 28 of typewritten transcript of Bill of Exceptions proposed by appellant), in connection with the Government's objections to written offers on the part of respondents to prove certain facts by means of the testimony of Adolph F. Meyer.

10. By striking from lines 24 and 25 on page 6 of the typewritten transcript of appellant's proposed Bill of Exceptions the words in parenthesis in the following sentence:

That there has been no market in the usual and accepted sense of that term for flowage easements (on the shores of the Lake of the Woods) .....

11. By adding to the proposed Bill of Exceptions at line 5 on page 92 of the typewritten transcript thereof, the testimony of William Rulien as set forth verbatim at pages 33-34 inclusive, herein.

12. By inserting at line 18, page 93 of such proposed Bill of the following passage:

"Mr. Harries: The Government has no objection to testimony on the part of this witness as to the price he paid for

the lands involved in this proceeding, but object to any testimony as to the motive he may have had in acquiring the same, on the ground that it is incompetent, irrelevant and immaterial."

and inserting at line 15 of page 96 of such proposed Bill the testimony of Elias Olson as shown on page 35, hereof, and by inserting at line 25, page 100 of appellant's proposed Bill of Exceptions the testimony of Randor G. Karlson, as set forth on pages 36 and 37 herein.

13. By adding to line 32 of page 7 of the typewritten
305 transcript of such proposed bill the word which is underlined in the following sentence:

"..... It was the court's opinion that the question could best be presented on appeal by his excluding all evidence which in any way tended to prove that respondents' lands had any additional value solely because of the fact that they formed a part of the Lake of the Woods storage reservoir."

14. By adding to line 2 page 8 of the typewritten transcript of the Bill of Exceptions proposed by appellant the following:-

Counsel for the respondents made the following additional statement immediately succeeding the statement last above described:

By Mr. Lewis:

Well, these are not to be regarded as offers of proof.

The Court: No, it is assumption of fact as the basis of your argument.

15. By changing the word four as it appears on line 7,
page 14 of the Bill of Exceptions proposed by appel-
306 lant to the word forty so that paragraph numbered 11 on said page shall be amended by omitting the word in parenthesis and substituting the words and letter underlined in the following passage:

"11. The Indian Act of the Dominion of Canada requiring a majority of consent from each band located on Indian reservation adjacent to said lake of which there are (four) forty renders it wholly impracticable and infeasible to contemplate successful negotiations with said Indian occupants leading to their consent to relinquishment of their reservations.

16. By adding to the Bill of Exceptions proposed by appellant at the end of the sentence completed at line 19 page 92 of the typewritten transcript of such proposed Bill, the following language:

Government counsel stated that there was no objection to testimony on the part of the witness as to the price he paid for the lands involved in this proceeding.

17. By adding to line 28 page 123 of the typewritten transcript of the Bill of Exceptions proposed by appellant the following:

The Government's objection was stated in the following terms (By Mr. Harries) We object to the exhibit and its reception in evidence on the ground that it is hearsay, incompetent, irrelevant and immaterial and no proper foundation has been laid for its introduction; and to the offer with reference to the knowledge of the people in Roseau and Lake of the Woods Counties, of the contents of this editorial, we object on the ground that that is immaterial.

18. By adding to the Bill of Exceptions proposed by appellants the whole of respondents' Exhibits 32 and 33, being, respectively, the government report of the final arguments at Washington, April 4 to 8, 1916, before the International Joint Commission on the Lake of the Woods reference (Exh. 32) and brief of Keewatin Power Company, Ltd., by C. J. Rockwood (Exh. 33) as original exhibits to be transmitted to the Clerk of the Circuit Court of Appeals for the Eighth Circuit and embodied in the Bill of Exceptions by reference and not to be copied therein.

19. By striking from line 13, page 114 of the typewritten transcript of the Bill of Exceptions proposed by appellant the words shown in parenthesis, and in lieu thereof inserting the words underlined in the following passage:

307 By Hon. C. J. Rockwood (member of) attorney appearing before the International Joint Commission.

By the Court,

JOHN B. SANBORN,
United States Judge.

Dated at St. Paul, Minnesota, July 30, 1931.

308 Amendments
of
Bill of Exceptions,
Referred to in Paragraph Number 1
of the Foregoing Order.

The foregoing amendments as contained in the Order of Court, Sanborn, J., dated July 30, 1931, are set forth at the end of the bill of exceptions as amended at [marginal] pages 175-206 and are not repeated here.

309 Testimony to be inserted in Bill of Exceptions as proposed by appellant, (in addition to the foregoing testimony to be added to appellant's proposed Bill of Exceptions).

The testimony has been duly inserted in the Bill of Exceptions, as amended, and is not repeated here.

Endorsed: Filed August 3, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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310 Motion and Order for Transmission of Original Exhibits to the Circuit Court of Appeals.

The United States of America, appellee, respectfully moves the Court, ex parte, for an order directing the Clerk of this court to transmit the following original exhibits to the Circuit Court of Appeals for the Eighth Circuit at Saint Louis, Missouri, in connection with the appeals herein, to said
311 court, upon the ground that such exhibits are of large proportions and that it is impracticable to duplicate all of them and include them in a transcript of the record.

1—Government exhibit numbered 4—The watershed map of the Lake of the Woods accompanying the report of engineers to the International Joint Commission relating to the investigation of the levels of the Lake of the Woods and tributary waters. Exhibit #4 in Law 539.

2—Government exhibit numbered 3—Map of lands in affected easement zone prepared by the Corps of Engineers of the United States Army under date of March 1, 1927.

3—Government exhibit numbered 2—Map of Lake of the Woods and surrounding territory indicating governmental subdivisions. (Exhibit #2 in Law 539.)

4—Government exhibit numbered 9—House of Representatives Executive Document numbered 247, 51st Congress, First Session (1 Volume).

5—Government exhibit numbered 10—Certificate of William Tyler Page, clerk of the House of Representatives, that government exhibit numbered 9 (H. R. Executive Document 247) is correct excepting as noted in memorandum attached to certificate.

6—Government exhibit numbered 11—True copy of original maps and text of the 18th Annual Report of the Bureau of American Ethnology, certified by Acting Commissioner of Indian Affairs, January 17, 1931.

7—Government exhibits numbered 13 to 17 inclusive—Certified copies of applications for homestead entry made by appellants or their predecessors in title.

8—Government exhibit numbered 21—True copy of original maps as the same appear in the Annual Report of the Commissioner of Indian Affiairs to the Secretary of the Interior for the fiscal year ending June 30, 1888, 1889 and 1890, certified by Acting Commissioner of Indian Affairs.

9—Government exhibit numbered 22—Photostatic copy of Rand McNally & Company's maps registered for copyright February 7 and February 17, 1888, certified by Acting Assistant Register of Copyrights, January 21, 1931.

10—Government exhibit numbered 23—Photostatic copy of Rand McNally & Company's maps registered for copyright July 23, 1888, and August 13, 1888, certified by Acting Assistant Register of Copyrights.

11—Government exhibit numbered 24—Atlas to accompany report of consulting engineers to the International Joint Commission relating to official reference re Lake of the Woods levels.

12—Government exhibit numbered 26—Copy of executive order withdrawing certain lands from homestead entry dated April 28, 1928, certified by Henry L. Stimson, Secretary of State by his Chief Clerk.

13—Government exhibit numbered 27—Copy of executive order withdrawing certain lands from homestead entry, dated January 14, 1929, certified by Henry L. Stimson, Secretary of State by his Chief Clerk.

312 14—Government exhibits numbered 28 to 54 inclusive, excepting however government exhibits numbered 33, 40 and 50, of which copies are being transmitted, the said exhibits being certified copies of deeds of land in the area affected by these proceedings.

15—Government exhibits numbered 60 to 71 inclusive, omitting therefrom government exhibit numbered 70, the same being respectively designated as the following: Representations of Canada, Divisions I, II, V, VI, VII Supplement to Division VII, VIIIA, XII and XIII.

16—Government exhibit numbered 71—Final Report of the International Joint Commission on the Lake of the Woods Reference.

17—Government exhibit numbered 94—Township map of a portion of Roseau County.

18—Government exhibit numbered 95—Township map of a portion of Lake of the Woods County.

19—Government exhibit numbered 96—Report of the Bureau of Census for 1930, showing the population of Townships of Lake of the Woods County bordering on Lake of the Woods at pages 17 and 18; and the population of Townships in Roseau County bordering on Lake of the Woods at page 25.

20—Government exhibit numbered 110—Certified copy of deed conveying flowage rights to the United States, dated April 5, 1928, Lewes Anensen and Regine Anensen, grantors.

21—Government exhibit numbered 113—Certified copy of deed conveying flowage rights to the United States dated August 27, 1928, Ole O. Lillevig and Bertine Lillevig, grantors.

22—Government exhibit numbered 114—Certified copy of deed conveying flowage rights to the United States dated May 28, 1928, Lars Engstrom and Karin Engstrom, grantors.

LEWIS L. DRILL,
United States Attorney,
Saint Paul, Minnesota.
By Donald D. Harries,
Special Assistant U. S Attorney,
1200 Alworth Building, Duluth, Minn.

Order.

Upon the foregoing motion made to the Court in Chambers ex parte

It Is Ordered that the original exhibits designated in the foregoing and hereto attached motion shall be transmitted to the United States Circuit Court of Appeals
313 for the Eighth Circuit at Saint Louis, Missouri, in connection with the appeal herein.

Dated at St. Paul, Minnesota, this 15th day of July, 1931.

By the Court:

JOHN B. SANBORN, Judge.

Endorsed: Filed August 3, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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314 (Praecipe for Transcript on Behalf of United States of America.

To:

Joel M. Dickey, Clerk of the United States District Court, Saint Paul, Minnesota.

E. Catherine Neff, Deputy Clerk of the United States District Court, Fifth Division, Duluth, Minnesota.

C. E. Berkman, Esq., Sartori Building, Chisholm, Minnesota.

I. K. Lewis, Esq., and Lewis, Hunt & Palmer, 500 First National Bank Building, Duluth, Minnesota.

John H. Hougen, Polk County, State Bank Building, Crookston, Minnesota.

315 Sirs:

Please Take Notice that the United States of America, appellee herein, having been served on July 1, 1931, with a copy of appellant's amended praecipe for transcript, hereby designates, pursuant to Rule No. 14 (2) of the Rules of the United States Circuit Court of Appeals for the Eighth Circuit, the following additional parts of the record deemed necessary by the appellee to a proper consideration of the appeals herein.

1. Order of Court, dated December 6, 1930, allowing amendment of petition in Law 539 (Fifth Division Law Number 1549).

2. The following paragraphs of the petition in Law 539 as amended by the order described in paragraph numbered 1 (next above):

Paragraphs I, II, III, IV, V, X, XI, XII, and the prayer of said amended petition.

3. Amendments of Bill of Exceptions, as allowed by order of Court dated July 30, 1931 and duly filed with the Clerk of

the United States District Court for the District of Minnesota, Fifth Division, at the City of Duluth.

4. Order of Court dated July 30, 1931, allowing appellee's proposed amendments of Bill of Exceptions presented by appellants.

5. Order of Court dated July 15, 1931, directing the transmission of the original Exhibits therein described to the Circuit Court of Appeals for the Eighth Circuit.

6. This praecipe.

The Clerk will please prepare and transmit to the Circuit Court of Appeals for the Eighth Circuit in connection with the appeals herein a transcript and true copy of the foregoing portions of the record and proceedings in the foregoing causes which are hereby designated by the United
316 States of America, appellee, as the additional portions of the record deemed necessary by it to a consideration and determination of the errors assigned by the appellant herein.

LEWIS L. DRILL,
United States Attorney,
St. Paul, Minnesota.
By Donald D. Harries,
Special Assistant United States Attorney,
1200 Alworth Building,
Duluth, Minnesota.

Endorsed: Due and personal service of the within Praecipe, by copy, is hereby admitted at Duluth, Minnesota, this 1st day of August, 1931.

LEWIS, HUNT & PALMER.

Filed August 1, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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317 VII.

(Petition for Appeal on Behalf of Elias A. Olson.)

To The Honorable, The District Court of the United States for the District of Minnesota:

Now comes Elias A. Olson, one of the respondents above named, and plaintiff in error herein, by I. K. Lewis, of the firm of Lewis, Hunt & Palmer, his attorneys, and feeling himself aggrieved by the final judgment and decree of this court en-

tered in his favor and against the United States of America, the petitioner above named, on the 13th day of February, 1931, hereby prays, that an appeal may be allowed to him from the said decree to the Circuit Court of Appeals of the United States of America for the Eighth Circuit, and in connection with this petition said petitioner herewith presents his assignment of errors.

Petitioner further prays that an order for a cost bond may be entered herein pending the final disposition of the cause, and that the amount of security may be fixed by an order allowing this appeal.

I. K. LEWIS, of Lewis, Hunt & Palmer,
One of the attorneys for Elias A. Olson,
Plaintiff in error, 500 First Nat'l Bank
Bldg., Duluth, Minnesota.

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318 IX.

Order Allowing Appeal.

On reading the petition of Elias A. Olson, for an appeal from the order and judgment of this court duly entered in said proceedings on February 13, 1931, and the assignment of errors presented and filed in connection with said petition, and upon due consideration of the record of said cause;

It Is Ordered, That an appeal be allowed to the Circuit Court of Appeals of the United States for the Eighth Circuit as prayed for in said petition, and that said appeal and all further proceedings thereon be allowed in accordance with law, on condition that within thirty days from the date hereof, appellant file a bond for costs in the sum of $500.00, with a surety or sureties to be approved by the court, that said appellant shall prosecute said appeal to effect, and if said appellant fails to make his plea good, shall answer to said petitioner, defendant in error, for all costs and damages that may be adjudged or decreed on account of said appeal.

Dated at Duluth, Minn. this 5th day of May, 1931.

By the Court:

JOHN B. SANBORN,
Judge, U. S. District Court,
District of Minnesota.

Endorsed: Filed May 11, 1931. Joel M. Dickey, Clerk. By J. L. Ketten, Deputy.

319 (Memorandum of Clerk of District Court as to Amended Assignment of Errors.)

The original amended assignment of errors having been filed with the Clerk of the United States Circuit Court of Appeals, and being a part of the records of that Court, it is omitted from this transcript.

(Amended Assignment of Errors Hereafter Appears in this Printed Record.)

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320 X.

Bond on Appeal.

Know All Men By These Presents, that we, Elias A. Olson, as principal, and Southern Surety Company of New York, a corporation organized under the laws of the State of New York, and holding the certificate of the Insurance Commissioner of the State of Minnesota, showing that it is authorized to contract as surety upon bonds in said State of Minnesota, as surety, are held and firmly bound unto the United States of America, in the full and just sum of $500.00 to be paid to the said United States of America, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of April, 1931.

And Whereas, lately at a term of the District Court of the United States, for the District of Minnesota, Sixth Division, in a suit pending in said court between United States of America, Petitioner, and Elias A. Olson, respondent, a judgment and final order was rendered in said action, and

Whereas, said respondent is aggrieved by said judgment and final order, and desires to appeal therefrom to the Circuit Court of Appeals for the 8th Circuit of the United States of America, and the said respondent, Elias A. Olson, the principal above named, having obtained an appeal to the Circuit Court of Appeals of the United States for the 8th Circuit, to reverse the judgment and final order in the aforesaid action and suit, Now, the condition of the above

321 obligation is such that if the said Elias A. Olson shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea and appeal good, then the above obligation to be void; otherwise to remain in full force and effect.

Sealed and delivered on the day and year hereinabove written.

Signed, sealed and delivered
in the presence of:

P. S. Smith
D. M. White
As to principal

ELIAS A. OLSON (Seal)

L. McFarlane
B. M. Andrew

SOUTHERN SURETY COMPANY
OF NEW YORK,
By C. F. Liscomb,
Its Attorney-in-fact (Seal)

322 State of Minnesota,
County of Lake of the Woods—ss.

On this 11th day of May, 1931, before me personally appeared Elias A. Olson, to me known to be the respondent and principal named in the foregoing bond, and he acknowledged that he executed the same for the uses and purposes therein expressed as his free and wilful act and deed.

P. S. SMITH,
(Notarial Seal) Notary Public, Lake of the Woods County, Minnesota.

My comm. expires Nov. 18, 1937.

State of Minnesota,
County of St. Louis,
City of Duluth—ss.

On this 16th day of May, 1931, before me personally appeared C. F. Liscomb, Attorney-in-fact of the Southern Surety Company of New York, with whom I am personally acquainted, who, being by me duly sworn, did depose and say, that he resides in Duluth, Minn.; that he is the Attorney-in-fact of the Southern Surety Company of New York, the corporation named in and which executed the within instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed and executed the said instrument as Attorney-in-fact of said corporation by like order.

LAURA McFARLANE,
(Notarial Seal) Notary Public, St. Louis Co., Minn.

My comm. expires Oct. 2, 1932.

Approval of Bond.

The within bond is hereby approved this 21st day of May, 1931.

By the Court:

JOHN B. SANBORN,
U. S. District Judge.

Endorsed: Filed August 1, 1931. Joel M. Dickey, Clerk, By E. Catherine Neff, Deputy.

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323 Citation.

United States District Court, District of Minnesota, Sixth Division.

United States of America, Petitioner and defendant in error,

No. 1549 vs. 8th Div.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the appeal of United States of America, petitioner, and of Elias A. Olson, respondent and plaintiff in error, from the award of the commissioners heretofore appointed herein in connection with the tract and easement numbered 147 as set forth in the said award.

The United States of America to United States of America, petitioner and defendant in error above named—Greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, forty days from and after the day this citation bears date pursuant to an appeal allowed and filed in the Clerk's office of the United States Court for the District of Minnesota, Sixth Division, wherein the above named Elias A. Olson is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against said United States of America, as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. John B. Sanborn, Judge of the United States District Court for the District of Minnesota, this 5 day of May, 1931.

JOHN B. SANBORN,
Judge of the United States District Court for the District of Minnesota.

Personal service of the within Citation is hereby admitted this 19 day of May, 1931.

DONALD D. HARRIES,
One of Attorneys for Petitioner.

Endorsed:- Filed in U. S. District Court on May 22, 1931.

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325 (Order for Consolidation of Three Appeals.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1931.

Tuesday, June 30, 1931.

United States of America, Petitioner,

vs.

Various Tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent and of Harry Brewster, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 248, as set forth in the said award.

and

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, petitioner-respondent, and of Randor G. Karlson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection

with the tract and easement numbered 86 and 87, as set forth in the said award.

and

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent, and Elias A. Olson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

On Appeal from United States District Court, District of Minnesota, Sixth Division. Transferred to Fifth Division.

The three appellants above named having moved the Court for an order consolidating said appeals, and for other relief, the Court being fully advised in the premises,

326 It Is Ordered: That the three appeals above entitled be and hereby are consolidated for all purposes.

It Is Further Ordered That a Consolidated Record for purposes of said appeals may be prepared and filed; that such Consolidated Records shall be sufficient for all purposes in each of said three appeals if it shall contain one original transcript of each of the following:

Petition and Order allowing Appeal, Bond, Amended Assignment of Errors, Citation, Stipulation or Praecipe for Transcript of Record, with proof of service thereof, Appellee's designation of any additional parts of the Record, the Judgment appealed from in each case, and any other stipulations, orders or other documents considered necessary to a proper hearing of said appeals by either party, including Briefs of Counsel, That said Consolidated Record be entitled and filed in the appeal of appellant Elias A. Olson, and be considered and used as having been prepared and filed in each of said appeals; and that each of said appeals be heard and determined in all respects, and with the same force and effect as though the customary and requisite papers, record and proceedings on appeal were filed and had in each of said appeals.

Dated at St. Paul, Minn. this 30 day of June, 1931.

327 United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing pages contain a full, true and complete copy of the Order for Consolidation of the three Appeals of Harry Brewster, Randor G. Karlson and Elias A. Olson in the case of United States of America vs. Various tracts of Land, etc., as full, true and complete as the original of the same remains on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 7th day of July, A. D. 1931.

E. E. KOCH,
(Seal) Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed: Filed July 9th, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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328 XIII.

Order of the Court Extending the Time within Which to File Designation of the Portions of the Record on Appeal.

On reading and filing the foregoing and hereunto attached stipulation,

It Is Hereby Ordered

1—That the time within which appellants may file in the court below a designation of the portions of the record deemed necessary by them to be included in a transcript thereof pursuant to Rule 14 of the Circuit Court of Appeals is hereby extended to and including July first 1931.

2—That the time within which appellee may file in the court below a designation of such additional parts of the record as it may deem necessary is hereby extended to and including August first 1931.

3—That the time within which the parties may file in the court below a stipulation designating the portions of the record to be included in the transcript to be sent to the Circuit

Court of Appeals, is hereby extended to and including August first 1931.

Dated at St. Paul, Minnesota, this 10th day of June, 1931.

By the Court:

JOHN B. SANBORN,
Judge, U. S. District Court.

Endorsed: Filed June 11, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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329 (Order for Transmission to U. S. Circuit Court of Appeals of Printed Volume entitled "Arguments on the Reference by the United States and Canada in re Levels of the Lake of the Woods", etc.)

In the District Court of the United States for the District of Minnesota, Sixth Division.

Transferred to 5th Division.

United States of America, Petitioner,
539. vs. Law.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

On cause being shown:

It Is Hereby Ordered: That the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, the printed volume entitled "Arguments on the reference by the United States and Canada in re Levels of the Lake of the Woods and its tributary waters and their future regulation and control" heretofore filed as an exhibit in connection with the ten test cases in the above entitled matter, for use on the appeal of Elias A. Olson to said United States Circuit Court of Appeals.

Dated at Duluth, Minn. this 3rd day of August, 1931.

By the Court:

WM. A. CANT,
U. S. District Judge.

Endorsed: Filed August 3, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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330 (Election as to Printing of Record.)

To The Clerk of the Above Named Court:

Notice is hereby given that the above named respondent-appellant, hereby elects to take and file in the U. S. Circuit Court of Appeals for the 8th Circuit, in connection with the appeal heretofore allowed in the above entitled matter, to be printed under the supervision of the Clerk of said Appellate Court, and under its rules, a transcript of the parts of the record requested for hearing of the case in that court. This notice of election is filed pursuant to paragraph 10 of rule 26 of the U. S. District Court for Minnesota.

LEWIS, HUNT & PALMER,
Attorneys for appellants,
500 First Nat'l Bank Bldg.,
Duluth, Minnesota.

Endorsed: Filed August 1, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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331 (Order Extending Time to File Transcript.)

For good cause shown, I the Judge of said Court who signed the citation upon the allowance of an appeal herein, do hereby enlarge the time within which said action may be docketed and the record thereof filed in the United States Circuit Court of Appeals for the Eighth Circuit, so that said cause may be docketed and the record so filed on or before the 1st day of September, A. D. 1931.

Dated June 13, 1931.

JOHN B. SANBORN,
Judge.

Endorsed: Filed June 13, 1931, Joel M. Dickey, Clerk. By Margaret L. Mullane, Chief Deputy.

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332 (Amended Praecipe for Transcript by Elias A. Olson, et al.)

To The Clerk of the Above Named Court:

Please prepare and transmit to the United States Circuit Court of Appeals for the Eighth Circuit, in connection with the appeal heretofore allowed in the above entitled proceed-

ing, a transcript and true copy of the following portions of the record and proceeding in said cause:

1. Paragraphs 1, 2, 3, 4 and 5 of the Government's Petition in condemnation proceedings, together with the descriptions and ownerships mentioned in connection with Easements numbered 86-87, 147, 247, and 248-252, contained in said petition; together with the prayer for relief contained in said petition.

2. Order appointing Commissioners in said condemnation proceedings.

3. The preamble, the paragraphs 1, 2 and 3 of the Report & Award of the Commissioners, together with the report of said Commissioners on Easements numbered 86-87, 147, 247 and 248-252.

4. Notices of appeal by petitioner from the award of said Commissioners made in connection with Easements numbered 86-87, 147, 247 and 248-252.

5. Notices of appeal from the award of said Commissioners filed by respondents Elias A. Olson, Randor G. Karlson and Harry Brewster.

333 6. Petition for Order allowing appeal from said judgment by Elias A. Olson.

7. Amended assignment of errors.

8. Order allowing appeal.

9. Appeal bond.

10. Citation.

11. Certified copy of the order of the United States Circuit Court of Appeals consolidating said three appeals for hearing and determination.

12. Order of the court extending the time within which to file designation of the portions of the record on appeal.

13. Bill of Exceptions on said appeal.

14. The Court's certificate allowing said Bill of Exceptions.

15. This amended praecipe for transcript with proof of service.

LEWIS, HUNT & PALMER,
Attorneys for Appellants,
500 First Nat'l Bank Bldg.,
Duluth, Minnesota.

Service of the within amended praecipe for transcript is hereby admitted this 1st day of July, 1931.

DONALD D. HARRIES,
One of the Attorneys for Appellee,
1200 Alworth Bldg.,
Duluth, Minnesota.

Endorsed: Filed August 1, 1931, Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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334 Clerk's Certificate to Transcript.

I, Joel M. Dickey, Clerk of said District Court, do hereby certify and return to the Honorable The United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing consisting of 333 pages, numbered from 1 to 333, is a true and complete transcript of the record and proceedings in said cause, wherein United States of America is petitioner and various tracts of land in Roseau and Lake of the Woods Counties in the State of Minnesota, herein described; Oliver J. Selvog, et al., are respondents, and the whole thereof as relates to easements Nos. 86 and 87, 147, 247 and 248, as appears from the original records and files of said Court, except the original of the written objections presented by counsel for the Dominion of Canada in opposition to the offer of evidence of the value of respondents' lands for reservoir purposes; and I do hereby certify and return that I have annexed to said transcript and included within said paging the original Citation of Elias A. Olson, together with proof of service thereof.

Seal
U. S. Dist. Court
Fifth Div.
Dist. of Minn.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court at Duluth, in the District of Minnesota, this 6th day of August, A. D. 1931.

JOEL M. DICKEY, Clerk,
By E. Catherine Neff, Deputy.

Filed Aug. 10, 1931, E. E. Koch, Clerk.

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335 (Motion for Consolidation of Cases on Appeal, etc.)

United States Circuit Court of Appeals, Eighth Circuit.

On Appeal from United States District Court, District of Minnesota, Sixth Division.

Transferred to Fifth Division.

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner, respondent, and of Harry Brewster, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 248, as set forth in the said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Randor G. Karlson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86 and 87 as set forth in said award:

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Elias A. Olson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

Now come Harry Brewster, Randor G. Karlson and Elias A. Olson, the three respondents above named, by their
336 attorneys, and respectfully represent and petition the Court that the above entitled proceedings are proceedings in condemnation; that they are respectively three of the respondents in said proceedings; that appeals were conducted from the awards of the appraisers rendered in said proceedings, and that both they and Petitioner duly appeal from said awards; that said three appeals were tried together by consent and that only one record was made on said trial; that each of them has perfected a separate appeal to the United States Circuit Court of Appeals, Eighth Circuit, from the judgments entered in the trial court in said proceedings; that it is desirable and for the interest of all parties concerned that said three appeals be consolidated for hearing in the said Circuit Court of Appeals.

Wherefore, your petitioners respectfully petition and move that the Court make and file an order consolidating the said three appeals and permitting a consolidated record to be prepared and filed for the purpose of said appeals.

Dated this 30th day of June, 1931.

LEWIS, HUNT & PALMER,
Attorneys for Respondent-Appellants.

Endorsed: Motion for Order consolidating three appeals. Filed in U. S. Circuit Court of Appeals on June 30, 1931, E. E. Kock, Clerk.

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338 (Order as to Consolidation of Cases, etc.)

United States Circuit Court of Appeals
Eighth Circuit.

On Appeal from
United States District Court
District of Minnesota,
Sixth Division.
Transferred to Fifth Division.

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al, Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent and of Harry Brewster, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 248, as set forth in the said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al, Respondents.

In the matter of the Appeal of United States of America, petitioner-respondent, and of Randor G. Karlson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86 and 87, as set forth in the said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al, Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Elias A. Olson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

The three appellants above named having moved the Court for an order consolidating said appeals, and for other relief, the Court being fully advised in the premises,

It is ordered: That the three appeals above entitled
339 be and hereby are consolidated for all purposes.

It is Further Ordered That a Consolidated Record for purposes of said appeals may be prepared and filed; that such Consolidated Record shall be sufficient for all purposes in each of said three appeals if it shall contain one original transcript of each of the following:

Petition and Order Allowing Appeal, Bond, Amended Assignment of Errors, Citation, Stipulation or Praecipe for

Transcript of Record, with proof of service thereof, Appellee's designation of any additional parts of the Record, the Judgment appealed from in each case, and any other stipulations, orders or other documents considered necessary to a proper hearing of said appeals by either party, including Briefs of Counsel. That said Consolidated Record be entitled and filed in the appeal of appellant Elias A. Olson, and be considered and used as having been prepared and filed in each of said appeals; and that each of said appeals be heard and determined in all respects, and with the same force and effect as though the customary and requisite papers, record and proceedings on appeal were filed and had in each of said appeals.

Dated at St. Paul, Minn., this 30 day of June, 1931.

(Motion for extension of time to file Designation of
341 Portions of Record.)

Now come the undersigned Appellant-Petitioners and respectfully represent and petition:

That appeals having been perfected to the United
342 States Circuit Court of Appeals for the Eighth Circuit in the above entitled proceedings; and the Petitioners having moved the Court for leave to file amended Assignment of Errors in said appeals; and it being impracticable to bring on for hearing their motion for leave to file their said amended Assignments until June 30, 1931, and

Whereas, the time permitted by the Court within which to file their Designation of the Portions of Record deemed necessary by them on said appeals, expires July 1, 1931, and it being desirable that Petitioners have an extension of time within which to file said Designation;

Now, Therefore, Petitioners respectfully petition and move the Court for an order extending the time within which they may file their Designation of the Portions of the Record deemed necessary by them on such appeal, to and including July 6, 1931.

Dated this 30th day of June, 1931.

LEWIS, HUNT & PALMER,
Attorney for Respondent-Appellant.

Endorsed: Motion for extension of time to file designation of portions of record. Filed in U. S. Circuit Court of Appeals on June 30, 1931, E. E. Koch, Clerk.

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344 (Order of U. S. Circuit Court of Appeals Extending Time for Filing of Designation of Portions of Record, etc.)

On motion of the above named appellants, and on cause being shown, the Court being fully advised in the premises,

It Is Hereby Ordered That the time within which said
345 Appellants may file in the Court below a designation of the portions of the record deemed necessary by them to be included in a transcript thereof, pursuant to Rule 14 of the Circuit Court of Appeals, is hereby extended to and including the 6th day of July, 1931.

Dated this 30 day of June, 1931.

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347 (Motion for Leave to File Amended Assignment of Errors.)

Now comes the undersigned Appellant-Petitioners and respectfully represent and petition the Court:

That appeals have been perfected by each of the Re-
348 spondents above named in the above entitled proceedings to the United States Circuit Court of Appeals, Eighth Circuit, and that Assignment of Errors has been duly served and filed in connection therewith; that for the purpose of presenting in a complete and convenient form before the Court and opposing counsel the facts and the portions of the record relied upon in said appeals, it is deemed advisable and necessary that amended Assignment of Errors be served and filed; that such amended Assignments may be served and filed without in any way delaying or otherwise prejudicing or complicating the hearing of said appeal;

Wherefore, your Petitioners respectfully move and petition the Court that the Court make and file an order permitting them to serve and file the one hundred forty-five consolidated Assignments of Errors hereunto attached and submitted herewith.

Dated this 30th day of June, 1931.

LEWIS, HUNT & PALMER,
Attorneys for Respondent-Appellants.

(Endorsed): Motion for leave to file Amended Assignment of Errors. Filed in U. S. Circuit Court of Appeals on June 30, 1931, E. E. Koch, Clerk.

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350 (Notice of Motion for Leave to File Amended Assignment of Errors.)

To L. L. Drill, United States Attorney, and to D. D. Harries, Special Assistant United States Attorney, Attorneys for Petitioner-Respondent:

You Will Please Be Notified That on Tuesday, June 30th, 1931, the above named Respondent-Appellant will move the court for leave to file amended Assignment of Errors in conformity with the copy thereof herewith served upon you.

You will please be notified that said motion will be brought on for hearing before the Hon. Kimbrough Stone, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, sitting in the Federal Building, at St. Paul, Minnesota, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated June 27th, 1931.

LEWIS, HUNT & PALMER,
Attorneys for Respondent-Appellant, 500 First Nat'l Bank Bldg., Duluth, Minnesota.

Personal service of the within Notice is hereby admitted this 27 day of June, 1931.

DONALD D. HARRIES,
One of the Attorneys for Petitioner.

Endorsed: Filed in U. S. Circuit Court of Appeals on June 30, 1931, E. E. Koch, Clerk.

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352 (Order of U. S. Circuit Court of Appeals Granting Leave to File Amended Assignment of Errors.)

United States Circuit Court of Appeals, Eighth Circuit.

On Appeal From United States District Court, District of Minnesota, Sixth Division, Transferred to Fifth Division.

United States of America, Petitioner;
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent and of Harry Brewster, Respondent-Appellant from the award of the Commis-

sioners heretofore appointed herein in connection with the tract and easement numbered 248, as set forth in the said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent and of Randor G. Karlson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86 and 87, as set forth in the said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Elias A. Olson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

On motion being made by the three appellants, above named, and on cause being shown, the Court being fully advised in the premises, all parties being represented and no objection thereto,

It Is Ordered that said appellants be and hereby are
353 permitted jointly to serve and file an amended Assignment of Errors, consisting of the 145 Assignments attached hereto, and that the same be filed and considered with the same force and effect as though the said Amended Assignment of Errors had been served and filed originally when said appeals were allowed.

It Is Further Ordered: That said Amended Assignment of Errors be included in the Consolidated Record on appeal in the three appeals above entitled, in lieu of the original As-

signment of Errors in each of said appeals, and that said original Assignments of Errors be not included therein.

Dated at St. Paul, Minn., this 30 day of June, 1931.

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1 Amended Assignment of Errors.

Filed Jun. 30, 1931, E. E. Koch, Clerk

United States District Court
District of Minnesota
Sixth Division
Transferred to Fifth Division

United States of America, Petitioner and defendant in error
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents

In the matter of the appeal of United States of America, petitioner, and of Elias A. Olson, respondent and plaintiff in error, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

Now comes the above named respondent-appellant and plaintiff in error, by his attorneys C. E. Berkman, John H. Hougen, and Lewis, Hunt & Palmer, and in connection with his petition for an order allowing an appeal says that in the record and proceedings and in the final judgment and decree referred to in said petition, manifest error has intervened to the prejudice of the respondent-appellant and plaintiff in error, to-wit:

1. That the court erred in sustaining petitioner's objection to the following questions and offers to prove:

Q. (By Mr. Lewis) Now, you may state, if you will, Mr. Rulien, whether there has been any considerable amount of discussion, public discussion, and general talk among the people in the Lake of the Woods County, and Roseau County, with reference to these flowage easements?

2 Mr. Harries: Just a minute. That is objected to as immaterial, hearsay and incompetent.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: We offer to show by this witness that there has been throughout Roseau County and Lake of the Woods County, on the shores of the Lake of the Woods, a great deal of public and private discussion, and common talk among people generally, regarding the flowage easements and their value.

Mr. Harries: To which we object on the ground as above stated.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Q. (By Mr. Lewis) You may state, Mr. Rulien, whether you have heard a great many people who have attended the hearings of the International Joint Commission which were held at Warroad and Baudette, and possibly at other places along the Lake of the Woods, with reference to what had been stated in those meetings? A. Yes, I have.

Q. And you may state whether it was talked among the people up there generally about what had been reported and said by the International Joint Commission, with reference to the value of these flowage easements and the lands below contour 1064?

Mr. Harries: That is objected to as immaterial and hearsay, and incompetent and irrelevant.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: We offer to prove by this witness that he has heard a great many people who attended the hearings
3 of the International Joint Commission, ever since said hearings were held in the Counties of Roseau and Lake of the Woods, in 1914, 1915 and 1916, discussing the statements which had been made by the members of the International Joint Commission and their advisors, that the flowage easement here in question, and the value of the lands below contour 1064, were very valuable.

Mr. Harries: To which we object on the ground that same is hearsay, incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Q. You may state whether there was a current and a common rumor,—by that, I mean public talk and discussion gen-

erally, with reference to the flowage easements on the lands below contour 1064, being more valuable than were the lands above contour 1064? A. Yes.

Mr. Harries: I move that the answer be stricken on the ground that it is incompetent, irrelevant and immaterial.

Mr. Lewis: Just wait for the objection, please.

The Court: The motion is granted.

(Offer of proof by Mr. Lewis—not in the hearing of the Jury).

Mr. Lewis: We offer to prove by this witness that there was at all times following the hearings held by the International Joint Commission in the counties above named, a great deal of public discussion, and current common rumor to the effect that the lands below contour 1064, and the flowage easements here in question, and the flowage rights on said lands, were of much higher value than the lands above contour 1064.

Mr. Harries: To which we object on the grounds last above noted.

The Court: The objection is sustained.

Mr. Lewis: Exception.

See Pgs. 209-211 of Settled case.

4 2.

That the Court erred in sustaining petitioner's objection to the introduction of testimony relative to the value of the flowage easements sought to be acquired, and the value of the lands in question for reservoir and flowage purposes, as disclosed by the following proceedings:

By Mr. Lewis:
Q. Will you give your full name please?
A. Bernard A. Arnesen.

Mr. Harries: Before proceeding further with the testimony of this witness, I would like permission to make to the Court a full statement of our objections to it.

The Court: Very well.

(Here followed a full statement by Mr. Harries of Petitioner's objection to evidence of the value of the flowage

easements being acquired, and the value of the lands for reservoir and flowage purposes, covering Ps. 233-242.)

The Court: I think we might as well face this situation right now, and discuss the law.

Mr. Lewis: I would agree with Your Honor, except for the fact that as we understand the law, certain questions of fact would be material in a determination of the questions of law, and it is on those questions of fact that evidence is being offered.

The Court: Yes, I understand, but of course the Government contends that the evidence you are putting in now is not competent or material on this question. We have the testimony of one witness. The Government is now moving that that be stricken out on the ground that it is not competent, and in view of the Government's position relative to that, it seems to me that we might just as well omit the rest of the testimony at this time and discuss the whole question presented. If there is any other evidence that you think the Court should have, outside of the testimony which this witness which you are putting on now, will testify to—I presume these witnesses are going to testify to their having made purchases of land below 1064 with the idea that they had a greater value than other lands up there on account of their use for reservoir purposes—of course I could receive that.

Mr. Lewis: This suggestion occurs to me in that connection, we are all interested in shortening the time and if anything develops in the argument where a question of fact becomes material, upon which there is no evidence, counsel can state to the court what the fact would be on that, and in that way probably shorten the time a great deal.

The Court: That was what I was thinking. I think we can take care of the whole thing by discussing it at this time.

(Jury retires)

Mr. Lewis: As suggested before the jury was excused, perhaps it would be helpful to the court in determining the questions of law, if I were to state on behalf of the respondents, the facts which the respondents will prove. I will state such of those facts that I consider pertinent, and if I omit any of them and they occur to me during the remarks which I shall make later, I will ask leave then to supplement this statement of facts.

The respondents will prove that the lands below 1064 and the right to flood those lands has been recognized as of high value ever since 1899, the year following the completion of the Norman Dam, and the time when the lands were first flooded. The evidence will be that the respondents, some of them, went over to the site of the Norman Dam, and that it was generally known as early as 1899 that the Canadian power companies had built the Norman Dam for power purposes, and that the cause of the lands being flooded was the fact that a dam had been built and was being used by the Canadian power Companies and that as early as 1899 it was known by the Canadian power companies were using and probably would continue to use their lands for reservoir purposes; that although the power possibilities of the Winnipeg River had not been fully developed at that time and had not been fully appreciated, nevertheless it was known in a general way that there were tremendous power possibilities on the Winnipeg River.

The respondents will prove also that very early, probably as early as 1903, 1904 or 1905, along in there, an association was formed of the property owners on the American shores of the Lake of the Woods, and that this association was organized and functioned for the purpose of obtaining just compensation from the power companies that were then flooding their lands, and also to cause the power companies, either to discontinue flooding their lands, or to arrange to pay just compensation. The respondents will prove that this association—I think the name of it at that time was the Low Water Association—that this association extended into both of the counties of Roseau and Lake of the Woods; that this Low Water Association employed counsel, and that from that time, that is, from the time of its organization, somewhere along in 1893, 1894 or 1895, down to the present time the organization of the property owners has been in existence, and that the Association has been represented at various times by a number of different counsel. I believe one of the first attorneys was a man by the name of Taylor. Shortly thereafter the property owners association or the Low Water Association was represented by Mr. Halvor Steenerson, who later became Congressman Steenerson. The respondents will show also that following the representation by Mr. Steenerson, the Honorable Charles Loring, now a member of the Supreme Court of this state, represented the property owners for a number of years I believe; and also that for some period of time Mr. G. Ahron Youngquist, now

Assistant Attorney General of the United States represented the property owners; that thereafter the property owners were represented by Mr. C. E. Berkman, an attorney now located at Chisholm, Minnesota, and who at that time lived not far from the village of Warroad; that thereafter the property owners were represented by the firm of Middleton and Middleton, Attorneys at Law of Baudette, and subsequent to the death of the younger Mr. Middleton the property owners were represented by the now Honorable Julius J. Olson of Warren, who has recently been appointed by the Governor to the District bench in that part of the state; and that thereafter they have been represented by counsel who are representing them in court in this case.

That during this entire period the property owners were all informed, and it was a matter of common talk and common discussion and common insistence through these associations of property owners, advised as they were by counsel, that the lands that were being flooded had a peculiar and a higher value because of their availability and peculiar use for flowage purposes; that that has been a matter that the property owners had insisted upon, and have had thoroughly in mind and have acted upon ever since the first flooding of their lands immediately following the construction of the Norman Dam in 1898.

The respondents will further prove in that connection that being advised as they were, such property owners as were able to do so, acquired certain of these low lands that were being flooded, for no purpose except that they were regarded as valuable for flowage purposes. We will show by a number—and we could bring in a much larger number if it meant any more—but we will show by a number of people who owned higher lands and who had their homes on higher lands, that they bought these low lands that were flooded, back some of them as early as 1915 and 1916; that they have not used those lands for any purpose except occasionally perhaps to cut hay, since the time they acquired them down to the present time; that they had no use for them; that they were bought solely because of the value which the public in that part of the country believed those lands to possess for reservoir purposes. The respondents will show that they would not have bought those low lands except for their peculiar use and value because of their availability and adaptability for reservoir purposes, and they will show that they paid a higher price for them than they otherwise would have paid if it were not for their value for reservoir purposes.

It is already in evidence, and I state this only to complete the structure of the facts in the case—it is already in evidence that as early as the time when the International Joint Commission was conducting its investigation of the value of these lands, before it could be said that even the International Joint Commission had formed an opinion as to how the lands should be handled, that the most valuable use of these low lands that were then being flooded, was their use for reservoir purposes. They had exactly the same use at that time when the International Joint Commission found that to be the fact, as they had had ever since the building of the Norman Dam. There had been no change; so if the most valuable use to which those lands could be put, and if their highest value when the International Joint Commission made that finding, was their value for reservoir purposes, it necessarily follows as an irresistible conclusion, that these lands had always possessed that value ever since they began to be flooded and began to be used for reservoir purposes.

So, if the Court please, we have got that fact fixed beyond any possibility of question or suspicion; fixed by so responsible and by so disinterested a tribunal as the International Joint Commission.

9 The respondents will prove the further fact that during all of these years there has been no market for these lands below 1064, that is, the lands that were being flooded. Such of those lands as have been bought and sold, the respondents will show, were bought and sold in almost every instance, not in the open market, but were bought and sold on distress or forced sales; that those sales could not be regarded in any way as an evidence of value.

The respondents will further show that it is the custom and practice in the hydraulic industry or profession generally, that there is no market in the accepted sense of that term, for flowage easements, or for lands that were bought for flowage purposes; that in the very nature of the industry, there cannot be a market for flowage easements or for lands for flowage purposes, for the very obvious reason that in the first place, each project, as pointed out in the objection of the Government, must depend upon the facilities of that particular project, the nearness to the market; the cost of the construction of the electric equipment; the competition which water power will have with steam or other transmission lines, and matters of that kind; and then for the very obvious

reason that in every instance where a hydraulic property is being developed, it is being developed by a concern that is owning and controlling the natural facilities. It is almost invariably the rule that before the flowage rights or the lands that are to be flooded are acquired, that the person or the corporation that is going to develop that water power project has acquired the site, the location at the Falls, and so he becomes the only person or corporation that can possibly use those lands.

These facts, if the Court please, the respondents are prepared to show by men of long experience in the power industry, both in this state and elsewhere, and I am sure will establish to the satisfaction of all, that there is no such thing as a market in the ordinary sense of the term, and that there could be no such thing.

Then, if the Court please, the respondents, as they conceive the development of their case, will urge upon the Court that in view of the fact that as early as the investigation of the International Joint Commission these lands were found to be more valuable for flowage purposes than for any other, and since that fact was recognized and insisted upon by the property owners from the very beginning of this project more than thirty years ago, and since there not only is not, but there could not possibly be a market to aid the Court in its determination of what is or what has been the fair value of these lands, we come to the next very necessary and very logical step; what was the fair value of these lands at the time that they were taken.

The International Joint Commission has found that they were more valuable than other surrounding lands; the people themselves [invisted] that they were more valuable; they bought lands in reliance on the proposition that they were more valuable and then comes the question: how much more valuable were they, and what was their value?

Upon that point, if the Court please, we will offer evidence to the Court by men whose qualifications are unquestioned, men whom the Court is already acquainted with, as to what the fair value of those lands actually was.

Taking up the discussion at that point, if the Court please, I will direct the Court's attention to the fact that the Government in this case is not condemning lands. The Government in this case is condemning a flowage easement. The treaty between the United States and Canada refers to flow-

age easements. The Act of Congress which created
11 the treaty, or carried the treaty into effect, refers to flowage easements. The engineers, when they attempted to make purchases before the condemnation proceedings, sent out letters, as we will offer to prove, in which they were offering to buy flowage easements; and so if the Court please, the inquiry in this case is not, as in the ordinary condemnation case "What is the value of lands." It is not what would have been the value of these lands the day before the condemnation, and what is their value the day after, because we are concerned with the question of what is the value of the easement, and we will prove to the Court by men who are competent to testify and to establish that fact, that the value of an easement in a bog or in a marsh is exactly the same as the value of a flowage easement on the most highly developed piece of agricultural land, or even a city lot; and so it will be the contention of the respondents in this case that the sole and only subject of inquiry in this litigation is "What is the value of the flowage easement?", and if I may be permitted to mix in something of the law and the facts in this case, in this statement that I am making, we will urge—I will say that we will urge this upon the attention of the Court—that the rule which counsel [seated] in connection with his motion, that the measure of damage is the difference between the value of the property before the easement was imposed and its value after the easement is imposed, applies not at all to the sort of thing that is now before the Court. That applies to the ordinary small condemnation for a road or a right-of-way which can be placed in one quarter section as well as another, and which takes only a part of the thing taken. It is the contention of the respondents, if the Court please, that in this case the Government is taking the whole of a certain specific piece of property. We will prove to the Court
12 as a fact that in the State of Minnesota, as well as everywhere generally, flowage easements are regarded as property. A flowage easement on a given piece of land is a separate and distinct unit of property entirely independent insofar as its valuation and its entirety is concerned; entirely independent from the value of the land upon which that easement rests. The easement itself in the State of Minnesota, and I think generally, is regarded as a distinct and separate unit of property, and so just as in a case where a condemnor takes an entire piece of property, the inquiry immediately follows: what is the value of the property taken? If the whole forty is condemned, the inquiry is not "What was the value of that forty before and after the con-

demnation'' but the inquiry is ''What was the value of that whole property when it was taken''.

And so here, inasmuch as the Government is taking the entire flowage right, this entire unit of property, the only inquiry before the Court is ''What is that unit of property worth?'' and that fact we will prove to the Court. I think that is probably as full a mixed statement of fact and law I need to make to the Court at the beginning, although I would like to ask my associates whether I have omitted anything.

The Court: Very well.

Mr. Lewis: Mr. Hougen calls my attention to the fact also that the respondents will endeavor to prove, and I think will be able to prove to the Court by competent evidence, that there is nothing in the development of the Lake of the Woods power project that differs in any way from similar developments in international waters, such for example as the development of the St. John River construction, of which there has been some discussion here in the evidence. We will prove to the Court that it is the policy of the two Governments to develop these international waters for power purposes wherever possible without interference with other rights.

13 At Mr. Hougen's suggestion also, I overlooked a point. The respondents will show that it is the custom and practice to buy and sell flowage easements as separate and distinct units of property. We will also show that these flowage easements are recorded in the Register of Deeds' Office, the same as any deed of transfer. The respondents will show also that flowage easements are taxed, by taxing municipalities, as separate units of property.

I think that that is as full a statement as I wish to make at this time. As the discussion progresses, if there are any questions of fact that appear to be material, counsel for respondents will state very frankly to the Court what we are able to prove and what we are not able to prove on those questions.

Mr. Harries: The effect of our objection may be applied to the offers of proof that have been made by counsel?

The Court: Yes.

* * * * * * * * *

Mr. Lewis: Yes. Does the Court care to hear a discussion of the law and a citation of cases at this time, and if so, which side does the Court wish to hear first?

The Court: Well, what I had in mind was this; I think I understand fairly well from what has been said here and what was said in the other case, what the Government's position is, and I thought that I would let you state as fully as you wanted to, just what your position is both as to the law and the fact, and then if Mr. Harries wishes to make a short reply, maybe we could save some time that way. We will take a ten minute recess.

(Argument by counsel on Motion.)

(And not in the presence of the Jury.)

The Court: Under all the circumstances in the case I
14 think I will sustain the objection which the Government has made to the introduction of the testimony relative to Reservoir Values, and I will strike out the testimony of William Rulien; and I will allow you an exception.

3.

That the Court erred in striking from the record the following testimony of the witness William Rulien:

Q. (By Mr. Lewis) You may state, Mr. Rulien, whether you know of any lands below contour 1064 which were bought for the purpose of taking advantage of the flowage rights on those lands, or were bought because of the flowage rights on those lands?

Mr. Harries: The question, you understand, is whether you know of any such sales?

A. Yes, I do.
Q. (By Mr. Lewis) You may tell of them.

* * * * * * * * *

Q. (By Mr. Harries) One sale that you know about?
A. Yes.

Q. (By Mr. Lewis) And who made that purchase?
A. I made it.

Mr. Harries: I move that the answer be stricken for the purpose of making an objection.

The Court: It may be stricken.

* * * * * * * * *

By Mr. Lewis:
Q. What was the condition of the land that you bought in 1916, as to the state of the water?

A. It was covered with water.
Q. 1916 was a year of very high water, was it not?
A. Yes, it was.
Q. Well, you may state whether all of the land which you bought in 1916 was below water at the time that you bought it?
A. Well, I believe it was all under water, that we could not go over it, as far as I could ascertain from standing at the nearest point, in looking it over.
Q. And for what purpose did you buy that land?
A. Well, for the reservoir purposes.
Q. Did you pay more for that land because it was below contour 1064, and because it was useful and available for reservoir purposes, than you would have paid for it, if it had not been useful and available?

Mr. Harries: That is objected to on the ground that the motive of this witness has no relevancy as to the inquiry here.

The Court: The objection is overruled.

Mr. Harries: Exception.

A. Yes, I did.

By Mr. Lewis:
Q. You say you did? A. Yes, sir.
Q. Would you have bought that land at all, situated as it was, if it were not for the fact that the land carried flowage rights, it being below contour 1604? A. I would not.

* * * * * * * * * * *

4.

That the court erred in sustaining petitioner's objection to the following questions asked of and offers to prove by the witness Harry Brewster:

Q. And your answer was what? A. 220 acres.
Q. What is the reasonable value of the flowage easement and the flowage rights on that 220 acre tract which you say is below contour 1064?

Mr. Harries: That is objected to as incompetent, irrelevant and immaterial, and not the proper measure of damage.

The Court: Objection sustained.

Mr. Lewis: We all have in mind, of course, that Mr. Brewster is the owner of the land?

The Court: Yes.

* * * * * * * * * * *

Mr. Lewis: We offer to prove by the witness, the
16 respondent Brewster now on the stand, that the reasonable and fair value, and the fair market price of the easement which the government seeks to impose upon his lands in these proceedings, is $60,000.00.

Mr. Harries: To which offer we object on the grounds last above stated.

The Court: Objection sustained.

Mr. Lewis: Exception.

* * * * * * * * * *

Q. You said that you bought something over 160 acres of land in what year? A. 1922.

Q. In 1922. For what purpose did you buy that land?

Mr. Harries: That is objected to as immaterial, for what purpose he bought land.

* * * * * * * * * *

The Court: I think I will sustain the objection to that.

Mr. Lewis: Exception. May we make an offer in that connection?

The Court: Yes.

Mr. Lewis: We offer to prove by the witness, the respondent Brewster now on the stand, that in the year 1922 he purchased 160 and some odd acres, because that tract had a value and was reputed to have a value for storage and reservoir purposes. We further offer to prove by said witness that he paid a larger price for said tract which he purchased because of the fact that it had or was reputed to have a higher value for flowage and reservoir purposes. We further offer to prove by said witness that except for the fact that said tract had or was reputed to have a higher value for flowage and reservoir purposes he would not have purchased said tract at all.

Mr. Harries: The Government * * * objects to any
17 testimony as to the motive he may have had in acquiring the same, on the ground that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception.

5.

That the court erred in striking the following testimony given by respondent Brewster as to the value of his said land before and after the imposition of the flowage easement thereon.

By Mr. Lewis:

Q. Mr. Brewster, will you state what would be the fair market value of your 220 acres which you say are below contour 1064, and upon which the Government is seeking to impose a flowage easement, before that easement is imposed upon it; that is, when you have and own the full flowage rights on these lands? A. $300 an acre.

* * * * * * * * *

Q. All right. Now what is the fair market value of those lands below contour 1064 with the easement imposed upon it?

A. Nothing. It is valueless.

* * * * * * * * *

Q. And in telling us the valuation that you put on your land per acre, what basis did you have for the figures that you named? A. For power purposes.

Q. Were those the only purposes you had in mind?

A. Yes, sir.

Mr. Harries: The Government moves that the testimony of Mr. Brewster relative to the valuation of this land be stricken.

* * * * * * * * *

The Court: Well, I think I will grant the motion of the Government at this time, and then you can examine Mr. Brewster further if you wish, Mr. Lewis, later.

18 * * * * * * * * *

By Mr. Lewis:

Q. Now, Mr. Brewster, just on that same point, when you gave us the estimate that you placed upon your land, as to its fair value, or fair market value, as it is sometimes called, you were taking all of the uses, to which your land may be put, into account, or were you just taking into account some one or more uses?

Mr. Harries: Just a moment. That is objected to as leading and suggestive, and as repetition.

The Court: Well, I think that that is rather indefinite Mr. Lewis: If he thinks that it had the same value for any other purposes, except the one that he has given, I am perfectly willing to let him so state. You say "for all purposes of value, including power purposes." Of course, it is just as objectionable, according to my theory, as it is limited to that one use.

Mr. Lewis: We don't want to try to be evasive on that matter, if the Court please. Of course, it must be conceded and respondent does concede that the land would not have that value for any other purpose except for storage and reservoir purposes. I am perfectly frank on that proposition. My thought was that the inquiry is proper as to what the value of the land is for all purposes, including what we claim the most useful purpose.

The Court: Well, I think I will sustain the objection to that, with that explanation, because it seems to me that you are simply getting back to your own proposition again, that he is testifying as to what was the market value for power and reservoir purposes.

6.

That the court erred in sustaining petitioner's objection to the following testimony and offers to prove of respondent Olson:

19 Q. Just very briefly tell the Court and the Jury what connection you had with water power over in the old country. A. I used to work on the dam construction.

* * * * * * * * *

Q. And did you learn when you were over there in the old country anything about whether the lands that were covered with water, and had formed a part of the reservoir, were more valuable or less valuable on that account, than were the other lands? A. More or less valuable, yes.

Q. What was it, more valuable or less valuable?

Mr. Harries: Just a moment. We object to that on the ground that it is immaterial.

The Court: The objection is sustained.

Mr. Lewis: We offer to prove by the witness and Respondent Olson, now on the stand, that through his employment in Norway in connection with the construction of water-power dams, and his connection with water-power projects, that he

learned that the lands used for flowage and storage purposes were more valuable on that account than were other lands.

* * * * * * * * *

Q. Did you know about the power plants that were built, and that they were operating down in the Winnipeg River?

Mr. Harries: We object to that inquiry on the ground that it is utterly immaterial, and on the further ground that the Court has ruled on the question of the admissibility of this testimony.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: We offer to prove by this witness and Respondent Olson, that before filing for the homestead which he later acquired, he had been in the City of Kenora in the Dominion of Canada, where some of the dams here in question, and which obstruct the outlet of the Lake of the Woods, had been constructed, and that he was acquainted with the fact that extensive and valuable hydro-electric power plants had been built, and were in operation in the Winnipeg River.

Mr. Harries: To which we object on the ground that the offer of that testimony is incompetent, irrelevant and immaterial, and without proper foundation.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Q. (By Mr. Lewis) Will you state, Mr. Olson, what was your intention and your purpose in filing on the particular piece of land which you did file on, and which you later acquired as your homestead?

Mr. Harries: That is objected to as immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: Respondents offer to prove by the witness and Respondent Olson that his intention and purpose in filing on the tract of land which he later acquired as a homestead was because of the fact that said lands possessed and were reputed to possess high value for flowage and storage purposes.

Mr. Harries: To which the Government objects on the ground that the motive of acquisition is immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

* * * * * * * * *

Q. Will you state to the Court and Jury what is the fair value and the fair market value of that flowage easement?

Mr. Harries: Just a moment. That is objected to as incompetent, irrelevant and immaterial, not a proper measure of damages.

21 The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: The respondent Olson being the owner of the flowage right and easement sought to be acquired by the Government, offers to prove by his own testimony that the reasonable value and market price of said easement is $16,000.00.

Mr. Harries: To which the Government objects upon the ground that no proper foundation has been laid, and upon the further ground that the proposed testimony would not be based upon the proper measure of damage in the proceedings in this court.

The Court: The objection is sustained.

Mr. Lewis: Exception.

7.

That the court erred in granting petitioner's motion to strike from the record the following given testimony and evidence of respondent Olson:

Q. For all purposes, I said; what is the value of the 56 acres of land for all purposes?
[Q.] And everything else?
A. About $300.00 an acre.
Q. $300.00 an acre? A. Yes, sir.
Q. And what is the value of that same tract of land below contour 1064, after the flowage easement is imposed upon it?
A. It will be of no value.
Q. No value? A. No value.

* * * * * * * * *

Mr. Harries: The Government moves that the testimony of this witness relative to the value of lands below contour

1064 be stricken on the ground that it is based upon an incompetent and immaterial element of damage.

Mr. Lewis: That is objected to, if the Court please, for the reason that as we understand the rule of law, the owner of land is entitled to show and to prove all uses for
22 which his lands are reasonably adaptable.

The Court: The evidence may be stricken.

Mr. Lewis: Exception.

8.

That the court erred in sustaining petitioner's objection to the following testimony and offers to prove by respondent Karlson:

Q. I see, and you know that that condition existed (flooding of this land) as far back as 1915? A. Yes.

Q. Well then let me ask you again if I may, to complete the record; why, under those conditions did you buy that 120 acres that you say you bought in 1922? A. In 1921.

Q. 1921 I mean.

Mr. Harries: Objected to as immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception. The respondent offers to prove that the reason why he bought the 120 acres here in question in 1921 under the circumstances just disclosed by the evidence is because the said 120 acres was valuable and was reputed to be valuable for storage and flowage purposes.

Mr. Harries: To which the government objects on the ground that the motive of purchase is immaterial.

Mr. Lewis: Respondent further offers to prove that he paid a higher value for said 120 acre tract purchased in 1921 because of the fact that it possessed a higher value for storage and flowage purposes, than he otherwise would have paid, except for the fact that it possessed such higher value.

Mr. Harries: To which the government objects on the ground that the action of the respondent in paying more or less for his property at a given time has no bearing on the question of its value at the time of the award of the Commissioners in these proceedings.

23 Mr. Lewis: Respondent further offers to prove that at the time he purchased said 120 acre tract he purchased the same on a forced sale; that the grantor who sold

and conveyed said 120 acre tract to him was in financial distress and unable to meet his obligations, and that he conveyed and sold said tract to him under those circumstances and for those reasons.

Mr. Harries: Objected to as immaterial.

The Court: Objections sustained.

Mr. Lewis: Exception.

Q. Mr. Karlson, what is the fair value, and the fair market value of the flowage easement which the Government is seeking to impose upon your tract of land below contour 1064, which land is involved in these proceedings?

Mr. Harries: Objected to as incompetent, irrelevant and immaterial, and not the true measure of damage.

The Court: Objection sustained.

Mr. Lewis: Exception. The respondent offers to prove that the fair value of the flowage easement on the tract of land involved in these proceedings below contour 1064 is $44,000.00.

Mr. Harries: To which we object on the ground that the value of the flowage easement is not the true value, or not the true measure of the damage sustained by the respondent in these proceedings.

The Court: Objection sustained.

Mr. Lewis: Exception.

* * * * * *

Q. When you went up into that country did you hear any common report or talk among the property owners up there, and the people up there generally, with reference to the value of lands below contour 1064? A. Yes.

Q. What was that common report and talk that was
24 heard with reference to the value of these lands and the reasons for their being valuable or for their not being valuable?

Mr. Harries: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception. One more question.

Q. Mr. Karlson, did that common report and talk and conversation about the value of these lands continue from the time that you went up there, clear down to the present time?

A. Yes.

Q. And has that common talk and report that has been abroad in that neighborhood with reference to the value of these lands been substantially the same all the time from the time you went up there in 1904, down to the present time?

A. Practically, yes.

Mr. Lewis: Respondent offers to prove that when he went to the Lake of the Woods country in 1904 he found a great deal of conversation, common report and reputation abroad, among the property owners, and among the public generally in that community to the effect that the lands below contour 1064 were very valuable for storage and flowage purposes; that the power companies were using said lands below contour 1064 for storage and flowage purposes and that said lands were more valuable for that purpose than they were for any other use and purpose; that the value of said lands for use as storage and for reservoir purposes existed at that time and that the Canadian companies which had so used said lands were then owing to the owners of said property, substantial sums of money on account of said use of their lands.

Mr. Harries: To all of which the Government objects on the ground that the inquiry is incompetent, irrelevant and immaterial, and not the proper measure of damage in this proceeding.

The Court: Objection sustained.

Mr. Lewis: Exception.

* * * * * * *

25 Q. Do you know what is the most valuable use and purpose to which these lands may be devoted?

A. Yes.

Q. What is their most valuable use?

A. For reservoir and storage purposes.

Q. Do you know now what is the reasonable market value of the use of your lands for storage purposes and flowage purposes?

Mr. Harries: Objected to on the ground that he is not competent to testify on that subject.

The Court: Objection sustained.

Mr. Lewis: Exception.

Q. You may state, Mr. Karlson, whether the value to which you testified a moment ago, is the value that is placed upon those lands generally by the people in that community who are acquainted with the lands, and were acquainted with the value and use of those lands?

Mr. Harries: Just a moment—objected to as without proper foundation, and hearsay, and incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception.

9.

That the court erred in granting petitioner's motion to strike the following testimony of respondent Karlson:

Q. Mr. Karlson, will you state what was the fair market value of your lands which are involved in these proceedings before the Government imposed the flowage easement here in question upon them? A. $275.00 an acre.

Q. And what is the fair market value of these lands after the Government easement had been imposed upon them?

A. Worthless.

Q. The whole tract you say is below contour 1064?

A. Yes, sir.

* * * * * *

26

10.

That the court erred in sustaining petitioner's objection to respondent's exhibit numbered 5, and in refusing to receive said exhibit in evidence, said exhibit being an executor's deed in the usual form by R. M. Skinner, executor to W. E. McGuire, dated Feb. 21, 1930, the portion of which here material being:

"Reserving however, to the estate of Alonzo Wheeler, all claims which it now has against the United States of America, as a result of condemnation proceedings commenced by said Government in obtaining certain grants of easement to lands bordering on Lake of the Woods, in Minnesota."

11.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 6, and in refusing to receive said exhibit in evidence, said exhibit being a warranty deed in the usual form, by Anna McCagherty, a widow, to Lenus

Landby, dated May 26, 1924, the portion of which here being material:

"It is hereby agreed and understood by and between the parties hereto that said party of the first part reserves to herself and her heirs and assigns, an undivided one-half interest in and to any and all damages to said land that have or may have accrued, or may be assessed on account of the high water of the Lake of the Woods, and which matter of damages has been under the consideration of an International Joint Commission of the United States and Dominion of Canada."

12.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 7, and in refusing to receive said exhibit in evidence, said exhibit being a warranty deed in the usual form, by Frank Decker to Albertina Franson, dated August 27th, 1928, the portion of which here material being:

"Reserving flowage easements as provided by the treaty between United States and Great Britain, Feb. 24, 1925."

13.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 8, and in refusing to receive said exhibit in evidence, said exhibit being a Quit Claim
27. Deed in the usual form, by Russel J. Kidder to John F. Kidder, dated Nov. 19th, 1930, the portion of which here material being:

"The Grantor herein reserves to himself, his heirs, executors, administrators and assigns all claims for past damages due to artificial obstruction in the outlet of Lake of the Woods, also all claims for damages arising by virtue of the flowage easement that the United States is seeking to acquire, by reason of the raising of the level of the Lake of the Woods, and affecting said land."

14.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 9, and in refusing to receive said exhibit in evidence, said exhibit being a warranty deed in the usual form, by Ole S. Swanson to Emma Smith, dated January 2, 1926, the portion of which here material being:

"Said parties of the first part retain to themselves, their heirs and assigns, all rights and claims for damages which may be paid by the United States Government and the Dominion of Canada on account of high water on Lake of the Woods, arising prior to Sept. 28, 1920."

15.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 10, and in refusing to receive said exhibit in evidence, said exhibit being a warranty deed in the usual form, by William H. Ringling, to Ole Meland, dated October 6, 1927, the portion of which here material being:

"Said parties of the first part do hereby expressly reserve to themselves, their heirs and assigns any and all claims for damages that may have heretofore accrued to said land, or that may hereafter accrue, either for flowage easements or otherwise, on account of the fluctuation of the water levels of Lake of the Woods, the regulation of which has been established by a Treaty entered into by the Governments of the Dominion of Canada and the United States and dated on or about February 24, 1925."

16.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 11, and in refusing to receive said exhibit in evidence, said exhibit being a warranty deed in the usual form, by Clara A. Lockrem to L. S. Darbyshire, dated 16th day of March, 1928, the portion of which
28 here material being:

"Excepting and reserving to Clair A. Lockrem, his heirs and assigns, a flowage easement to elevation 1064 upon said lands, and any or all awards as may hereinafter be made under the Lake of the Woods Act, approved May 22nd, 1925, for a flowage easement to elevation 1064, or for such flowage easement as may be acquired under any amendatory act."

17.

That the court erred in sustaining petitioner's objection to respondent's offer of Respondent's Exhibit 1, the material portions of which are:

"Application

To the Honorable the International Joint Commission:

Application made by Saint John River Power Company (Hereinafter called the Applicant) for permission to construct and operate certain permanent works in and adjacent to the channel of the River Saint John in the Province of New Brunswick at a point on or near the said River known as Grand Falls; respectfully sheweth:

1. Status of the Applicant.

The Applicant is a Corporation duly incorporated by special Act entitled "An Act to Incorporate Saint John River Power Company" passed by the Legislative Assembly of the Province of New Brunswick during the session held in the present year, a copy of which with the exception of Schedules A, B, C and D thereto, is set forth as Appendix I hereto.

* * * * * * *

"5. The Company may generate, purchase or otherwise acquire, sell, transmit and distribute electrical power and energy, and specifically, but without limiting the generality of the foregoing, the Company shall have full right and authority to develop hydro-electric power on the Saint John River at or near Grand Falls and for that purpose to divert and regulate the flow of said river and its tributaries
29 both above and below its works, to such an extent and in such manner as it shall deem necessary, and also full right and authority to develop water storage and regulation thereof in New Brunswick and beyond its borders and in inter-provincial and international boundary rivers and streams, and to construct, maintain and operate transmission and distribution systems for such power anywhere in New Brunswick and to points beyond its borders; provided, however, that the Company shall not export electrical power or energy beyond the limits of Canada except to the extent necessary to comply with any order of the International Joint Commission appointed pursuant to the Treaty between the United States of America and Great Britain dated the 11th day of January, 1909, unless and only to the extent that such export shall be approved by the Lieutenant-Governor-in-Council."

* * * * * * *

3. General Description of Project.

The applicant proposes to develop the natural water power at Grand Falls for the production of hydro-electric power.

The power development project, as now conceived and planned, will involve the construction of storage dams at various points within the tributary basin and the ultimate capacity of the development is contingent upon the ultimate extent to which the dependable flow of the Saint John River above Grand Falls may in the future be progressively increased, through the agency of artificial storage.

The power site of Grand Falls lies wholly within the Province of New Brunswick, about three miles below the point at which the line of the international boundary intersects the medial thread of the River Saint John, and all the works and structures incidental to the initial phases of the project are in Canadian territory.

5. Effect of Proposed Works on International Waters.

The effect of the proposed works on international waters will be identically the same as the effect of the proposed works of the New Brunswick Electric Power Commission would have been and is as follows:

By means of the main dam above described it is proposed to hold the upstream pondage at an operating level corresponding to high water mark at Grand Falls, but at no time above such elevation.

During the freshet period, the river will rise to high water stage through the ordinary natural process as heretofore, but during the low water period the effect of the dam at Grand Falls will be to still maintain the high water stage in the immediate vicinity of the dam, and pond the water back for about thirty-two miles at an elevation somewhat above low water mark, but at the same time always below high water mark. The condition described is plainly indicated in the profile sheet, Plan No. III, submitted herewith.

* * * * * *

It will be seen that at the point where the ponded flow meets the international boundary, it is about sixteen feet above the natural minimum, and about four feet below the natural maximum water level. This relationship is seen to become gradually modified as the pondage extends upstream; until at Van Buren, Maine, the ponded level is only twelve feet above low water mark, and about fourteen feet below the natural maximum water level and finally reaches a point near St. Basil, New Brunswick, where the two levels coincide.

It is therefore evident, that the only land adversely affected at any point within the ponded reach is the riparian

strip below low and high water mark. The total area actually submerged at low stages of the river is eight hundred acres of which four hundred acres are in Canada and four hundred acres are in the State of Maine. This area includes, in addition to arable lands, a considerable acreage of sand and gravel bars exposed at periods of low discharge.

31 The extent to which arable lands below high water mark are affected is more clearly shown on Plans No. IV to X inclusive, these being large scale plans covering successive portions of the ponded reach and upon which are shown the contours on both banks of the river, and a flow line in red showing the relative positions of the present permanent shore lines and the new shore lines which will result from the creation of the proposed pondage.

The Applicant is fully aware of the fact that the above described use of international waters is subject to a prior right in respect of navigation and other uses, and in connection with the same it is submitted that the proposed raising of the level in the ponded reach, together with the general improvement in flow regulation, through the agency of artificial storage, will jointly effect a more efficient dilution of sewage wastes, provide a purer and more abundant water supply at all stages of flow, and improve navigation not only in respect to ferries and other small craft on the ponded reach, but on all sections of the Saint John River below the confluence of tributaries whereon storage dams may be located.

The progressive development of artificial storage will likewise in corresponding degree reduce flood damage and promote the interests of log driving by extending the season, improving the difficult reaches, and providing greatly improved facilities for booming and sorting.

Inasmuch as the project in question involves the placing of an obstruction in waters below the international boundary which will affect the level of waters above the boundary, and the flowing across the same, it is the opinion of the Applicant that your Honorable Commission may have jurisdiction in the premises, under the terms of Article IV of the Boundary Waters Treaty.

This Application is therefore respectfully submitted for your consideration.

32 Petition. The applicant does now pray for such order, ruling or decision, authorizing and empowering the Applicant to proceed with the said works as may in the opinion of your Honorable Commission be required by the

"Waterways Treaty Act" together with such provisos as may be deemed fitting in the premises.

All of which is respectfully submitted.

BROWN, MONTGOMERY & McMICHAEL DAVIS, POLK, WARDELL, GARDNER & REED,
Solicitors for Saint John River Power Co."

"Order

Whereas the Saint John River Power Company (hereinafter called "The Applicant") has presented to and filed with this Commission plans of certain permanent works (hereinafter referred to as "the said works") for the development of hydro-electric power in and adjacent to the channel of the River St. John in the Province of New Brunswick at a point in the said river known as Grand Falls, and has applied for approval of the said works and authority to proceed with the construction of the same under the provisions of the Treaty between the United States and Great Britain relating to boundary waters and questions arising between the United States and Canada of the 11th day of January, 1909; and

Whereas, the power site of Grand Falls shown on said plans and described in said application lies wholly within the said Province of New Brunswick about three miles below the point at which the line of the international boundary intersects the medial thread of the River St. John, and it is proposed to create and maintain a ponded area in the said river for a distance of approximately thirty-two miles above said Grand Falls, approximately twenty-nine miles of which ponded area is in that part of the river along which the international boundary between the United States and the Dominion of Canada passes; and

* * * * * *

33 Whereas, the present Application came on for hearing at the city of Washington in the District of Columbia on the 28th day of June, 1926, after due notice to all parties interested in both countries of the filing of said Application and of the time and place of said hearing; when evidence was adduced and counsel heard on behalf of all parties; and

Whereas, the Applicant has entered into an agreement with Madawaska Company (the successor in interest to St. John Lumber Company) covering the same subject matter as

was covered in the agreement between the New Brunswick Electric Power Commission and Saint John Lumber Company attached as Schedule A to the above mentioned order of this Commission dated the 22nd day of June, 1925, and a copy of said agreement has been communicated to this Commission, and contains provisions involving possible future references to this Commission; and

Whereas, the Applicant has entered into an agreement with Bangor and Aroostook Railroad Company and Van Buren Bridge Company covering the same subject matter as was covered in the agreement between the New Brunswick Electric Power Commission and said Companies attached as Schedule B to said Order of this Commission and a copy of said agreement has been communited to this Commission and contains provisions involving possible future reference to this Commission; and

Whereas, the Applicant has not yet effected a settlement with certain other owners of property which it is alleged will be taken or injuriously affected by said works, but has intimated that it expects and intends to do so; and

Whereas, conditional on this Order being granted, the agreement between Grand Falls Company, Limited, and the International Paper Company and the New Brunswick Electric Power Company, Commission attached at Schedule C to said Order of this Commission has been cancelled by the parties thereto; and

Whereas, at the hearings on the above mentioned Ap-
34 plication by the New Brunswick Electric Power Commission counsel for the United States claimed that the United States is entitled to a certain percentage of the power to be developed at Grand Falls as aforesaid, and the Dominion of Canada and the Province of New Brunswick denied this right; and

* * * * * *

Whereas, the members of this Commission after having read the letters addressed to its Chairman from the Premier of New Brunswick and the Chairman of the New Brunswick Electric Power Commission and from the Grand Falls Company, Limited, and International Paper Company referred to in the Application in this matter, and also letters to the Chairmen of this Commission from the Attorney General of the State of Maine, from the Bangor and Aroostook Railroad

Company and Van Buren Bridge Company, from Madawaska Company, from the Canadian National Railways and from the Canadian Pacific Railway, and after having read the agreements above referred to, and after having heard the evidence adduced and counsel for the Applicant, the United States, the Bangor & Aroostook Railroad and Van Buren Bridge Company, the Canadian National Railways and the Canadian Pacific Railway, and after having considered the matters above recited, have determined that the said works should be approved and authority given for the construction thereof pursuant to said Treaty, subject to the conditions hereinafter set forth.

1. This Commission Therefore Orders And Directs that the said plans be and the same are hereby approved, and the construction and operation of works in accordance therewith authorized under the provisions of said Treaty, upon and subject to the following conditions:

(1) That this Commission reserves to itself the right to take jurisdiction in the instances mentioned in the above mentioned agreements of the Applicant with Bangor and Aroostook Railroad Company, and Van Buren Bridge Company, and with Madawaska Company.

(2) That the said Applicant make suitable and adequate provision, to the satisfaction of this Commission, for the protection and indemnity against injury of all other interests on either side of the boundary.

(3) That the said works shall have such discharge capacity and be so constructed as to permit the passage of water at all flood stages in no less quantity than would pass down under natural conditions in the international section of the river, and whenever the flow of the river exceeds the discharge through the power house to such an extent as to cause the ponded level of the water surface immediately above the dam to rise above elevation 427.26 (mean sea level datum) being the operating level shown on sheet number 3 of said plans—the sluices and other works for the passage of water shall be so operated as to provide for the passage of the river flow until the water level at the dam falls to said elevation.

2. And This Commission Doth Hereby Reserve to the Applicant and to all parties having claims for injuries in respect of said works other than the parties to said agreement the

right to apply for such further order, direction or action with reference to such claims as may seem proper.

3. And This Commission Also Orders And Directs, in accordance with Applicant's suggestion in that respect set out in Section 2 of it Application, that the Applicant execute and deliver to International Paper Company an agreement in substantially the form appearing as Schedule A hereto and covering the supply of 2,000 H. P. of energy for use in the United States, it being understood that this condition is being imposed in order that the position of the United States and of the State of Maine on the one hand, and that of the Dominion of Canada and Province of New Brunswick on the other hand, shall be substantially the same under this Order as under the above mentioned Order of this Commission dated the 22nd day of June, 1925. But should the
36 above mentioned 2,000 H. P. cease to be available for use in the United States at any time for any reason this Commission reserves the rights of the parties to reopen the question and ask for a decision on the contentions of the United States and the State of Maine, and of the Dominion of Canada and Province of New Brunswick advanced at the hearings of this Commission on the above mentioned application of the New Brunswick Electric Power Commission, held at Van Buren, Maine, on the 25th day of March, 1925, and at Montreal on the 15th and 16th days of May and the 12th and 13th days of June, 1925. And until this Commission renders a decision on such questions the Applicant shall make available at least 2,000 H. P. for use in the United States upon receiving reasonable notice in writing requiring it so to do unless relieved by order of this Commission from so doing. Liberty is hereby reserved to the Applicant from time to time and at any time to apply to this Commission for relief from said requirement.

4. And This Commission Doth Further Order And Declare that nothing in this Order contained, in the recitals or elsewhere, shall by implication or otherwise be construed or taken as an expression of opinion on the part of the Commission with reference to the contentions above recited or as a recognition in any way of the principles contended for by counsel for their country at the hearings above mentioned.

Dated at Washington, D. C., this 28th day of June, A. D. 1926.

C. D. CLARK
C. A. MAGRATH
FRED T. DUBOIS
H. A. POWELL
P. J. McCUMBER
W. H. HEARST."

37 18.

That the Court erred in sustaining petitioner's objection to Respondent's Exhibit 32 being the volume of final arguments before the International Joint Commission, the material portions of which are:

"Mr. Tawney: Mr. Chairman, I desire to say that this arrangement was made in the absence of the chairman yesterday, and the reason for the arrangement is that the power interests involved in this investigation are the paramount interests so far as dollars and cents are concerned, and, following the analogy of condemnation proceedings, the party seeking to invoke the exercise of the power of eminent domain is usually the one that proceeds first and sets forth the reasons for the exercise of that power. While this is not by any means a condemnation proceeding, it is analogous. For that reason the commission concluded that inasmuch as the power interests were the paramount interests and would be the chief beneficiaries in the utilization of the waters of the lake and waters flowing into and from the lake, the burden should be on them to present their case, and then the other interests, after hearing the arguments of the power interests, could follow.

* * * * * * *

(By Hon. C. J. Rockwood, member of the International Joint Commission.)

"The one thing it seems to me that this commission should do is to see that it does not do anything that will tie the hands of the next generation and limit the possibilities of this water power. Every inch of elevation that can be added, if it can be used once a year, equals in the neighborhood of $100,000 in value every inch. The addition of a foot, if it is utilizable, adds in the neighborhood of a million dollars, computing power at $10 per horsepower. The values and the possibilities are simply beyond the conception of any of us, and the one thing most of all that should be in the minds of this commis-

sion and of everyone who acts with any responsibility
38 toward this development, is to see that nothing is done and nothing is permitted to be done that will tie the hands of the future."

* * * * * *

(By Isaac Campbell, K. C. representing the power interests of the City of Winnipeg).

* * * * * *

For that additional level and for the foot or two feet in height of contour, the lands falling within an additional contour of a foot and a half, we should pay, and we should pay in full, although the riparian owners may for several years out of 25 be able to make some use of that foot or 1½ feet. But if they are liable to have it flooded 1 year out of 25, or 3 years out of 25, we can not with very good grace, nor with justice, and, I think, not within the law, object to paying them for the full value of the land; and in recommending that value, it seems to me that you are not limited to the strict market value, not only the 10 per cent spoken of today, but 20 or 25 per cent might be added.

* * * * * *

As to making the compensation, we should be willing to pay fairly and in that sense liberally for the land that is injured, and that would be either condemned or taken over or whatever would be the procedure that would be adopted.

Mr. Mignault: When you say "we" whom do you mean?

Mr. Campbell: The Canadian power interests, the Dominion Government, so far as they own the power, and those that are now allotted or in use; and I am speaking for the community of the city of Winnipeg and I think we ought to pay a fair share, our full share and that there is no objection to its being computed fairly, and liberally, not put at the exact market value of 10 per cent, but at 20 or 25 per cent, that could with safety be added to what would be the estimated market value. And, more than that, that value should, as soon as your report is acted upon, be paid, then; that is, be paid now without waiting until the time comes when we will need to raise the water. We do not need to raise it now. We do not need any regulation now. My clients can get along if the Lake of the Woods were treated as now, and they
39 probably will for 8 or 10 years be able to do so. But it is not desirable that either the riparian owners or ourselves should be in doubt about the legal height of the

water available. It is not fair to them and not fair to us, and I think we should pay the full amount of the compensation that should be charged against us—pay it now, and although interest would be running on the money it would be avoiding trouble and doubt and anxiety, which would be well worth the use of the money, although you would not have the use of the added amount of water."

(By Mr. D. H. Laird, representing the Winnipeg Electric Railway Company and Winnipeg River Power Company.)

"As power users, we desire that higher level, and, as indicated by Mr. Campbell and Mr. Rockwood, the power users consider that adequate and full compensation should be made to the landowners for the land necessarily taken for that higher level; but the method of levying that compensation upon the power users, of course, is a purely domestic matter. If the power users in Canada get the benefit of it, I have no doubt that the Canadian authorities would see that they would pay it ultimately. We are vitally interested in the best use of those waters. We have invested now in the plant in Winnipeg millions of dollars. The direct investment at the power plant is very large, $6,000,000 at the power plant alone, and then we have all the investment in Winnipeg systems there, all dependent upon this power. Then we have spent $60,000 in the development of the new site at Great Falls. That contemplates an expenditure of seven million or eight million dollars for the ultimate development of that site. Our interest is very, very great in the most advantageous uses of those waters."

19.

That the court erred in sustaining petitioner's objection to respondent's offer to prove that:

Mr. Lewis: The respondents also offer to prove that
40 the publications and the arguments and facts contained in the arguments, as set forth in Respondent's Exhibit 32, were circulated among the property owners here in question, and the public generally in Lake of the Woods and Roseau Counties, and that the facts contained in these arguments were known by the property owners and the public generally in the two counties.

20.

That the court erred in sustaining petitioner's objection to respondent's offer of Respondent's Exhibit 33, presented to the International Joint Commission, being the brief by Hon. C. J. Rockwood, counsel for Minnesota & Ontario Power Company, and other allied companies. The portions of said Exhibit here material are:

"Added Power.

The river which flows out of Lake of the Woods is a great source of power, and the lake without artificial improvement is a great benefit to the river as a producer of power; but I shall point out that the control of the lake and of the waters that flow into it have added or will add not less than 100,000 continuous horse powers of energy to that which could be produced without such control. Perhaps much more could be accomplished. I shall deal only with the minimum.

"Value of Power.

These 100,000 horse power are, except in the matter of intelligence, equal to the labor of not less than a million men. Their work is perpetual. They produce power at a fraction of the cost of power from other sources. They do not perish with the using.

I reproduce from Water Resources Paper No. 3, page 274, a table of comparative costs of power in the City of Winnipeg:

41 Table 42. Comparison of the Cost of Fuel Power in Winnipeg with power from Pine Falls.

	Capital Cost Installed Complete	Per Horse-Power Year Load Factor			Per Kilowatt Hour Load Factor		
		25%	50%	75%	25%	50%	75%
250 H. P.	$	$ ¢	$ ¢	$ ¢	Cents	Cents	Cents
Steam	22,500	60.00	100.00	134.00	3.64	3.06	2.73
Diesel Oil	30,000	37.00	58.00	78.00	2.28	1.77	1.59
Producer Gas	27,500	47.00	77.50	108.00	2.88	2.37	2.20
Hydro-electric							
Initial	6,000	15.00	15.35	15.70	0.66	0.57	0.54
Complete	6,000	13.30	13.70	14.00	0.60	0.51	0.48
500 H.P.							
Steam	42,500	52.50	87.50	115.00	3.22	2.68	2.32
Diesel Oil	55,000	35.50	55.50	75.50	2.18	1.70	1.54
Producer Gas	50,000	42.50	70.00	97.00	2.60	2.13	1.97
Hydro-electric							
Initial	12,000	15.00	15.35	15.70	0.66	0.57	0.54
Complete	12,000	13.30	13.70	14.10	0.60	0.51	0.48

42 "The Effect of Regulation.

It is disclosed by the actual surveys reported in Water Resources Paper No. 3, pages 224, 234, 258, that any development of two power sites, Lower Seven Sisters and Upper Seven Sisters, is from a practical point of view dependent on complete regulation of flow. With complete regulation, the first of these has a capacity of 37,900 horse power with wheels of 75 per cent efficiency, and the second 29,600 horse power with wheels of the same efficiency, or an aggregate of 67,500. This power is wholly lost by absence of complete regulation.

Estimates of water power capacity are traditionally based upon 75 or 80 per cent wheel efficiency. It is safe now to depend upon 90 per cent. This change in basis of efficiency would add 2,857 horse power to the 22,860 and 13,500 to the 67,500, making respectively 25,717 and 81,000 or an aggregate of 106,717 produced by further regulation."

"Total Effect.

Taking all the items of gain into consideration, the total result of complete regulation may safely be estimated at not less than 115,000 horse power, and probably as high as 125,000 in addition to making present regulation lawful beyond question.

The Value of Regulation.

Using the smaller figure, 115,000 horse power, as the result of regulation, and the low estimate of ten dollars per annum as the value of a horse power, the result is $1,150,000 per annum, or interest at five per cent upon $23,000,000.

43 That ten dollars is not a high estimate of the value of a horse power, is shown by the comparison of costs of hydro electric and other sources of power found in Water Resources Paper No. 3, page 275; and that the actual development and use of this power in the not distant future is a practical certainty, is shown by the fact that over 85,000 horse power have been actually developed at Kenora, Keewatin, Piniwa and Point du Bois, and that, except for the war, work would have been fairly well under way before now on the development of another 1,000,000 horse power at the Du Bonnet Falls site.

The prediction would have seemed fanciful if made twenty-five years ago that this actual development would have occurred or would have been considered within this period."

* * * * * * *

"Water Power Property.

A water power property consists not only in the riparian ownership of land suitable for the construction of a dam. Equally necessary or other property rights, such as flowage rights.

* * * * * * *

The land necessary for this is part of the water power property. The site for a storage reservoir, although remote, is equally a part of the water power property.

* * * * * *

In the case of the Winnipeg River, the remotest and smallest reservoir site in the hills of the northeastern Minnesota, or across the line in Ontario, is as necessary to the full development of the water power property whose wheels are to be turned at Du Bonnet Falls, as is the location for the dam and power house itself. * * * *

44 Likewise of every intermediate reservoir, Lake of the Woods, Rainy Lake, Lake Namakan and all the rest. From time immemorial American law, and doubtless also Canadian law, has permitted the acquisition by compulsory process of these collateral properties as an aid in the development of water power.

In the United States, where the federal constitution and every state constitution permits the exercise of the power of eminent domain for public purposes only, some of the states have so defined the term "public use" as to exclude ordinary manufacturing enterprises and limit the term to such uses as the public would have some direct participation in."

* * * * * * *

"What Shall the Maximum Be?

Value of Stored Water.

The quantity of water found in a single foot in depth of water on the surface of the Lake of the Woods will create in its fall to Lake Winnipeg 39,480 horse power continuous for one year with wheels of 80 per cent efficiency, and 44,415 horse power with wheels of 90 per cent efficiency. The commercial

value at $10 per horse power per annum is $394,800 in one case, and $444,150 in the other. The capitalized value, if this use can be repeated once every year, is from eight to ten million dollars.

It seems to be assumed in the engineers' testimony, February, 1916, meeting, page 214, that at least one hundred billion cubic feet of storage will be created in Rainy Lake and above, and it is contemplated that one hundred fifty billions may be created. The commercial value of the flow of fifty billion in its fall to Lake Winnipeg would be from five hundred to five hundred fifty thousand dollars, and the capitalized value, if it can be repeated once each year, will be from ten to twelve million dollars."

45 "Value in Future.

It is a moral certainty that the time will shortly come when this power will have twice the value that is now estimated. Using the cost of coal as basis, it has more than twice that value now. These values are so great and so certain of realization that any and all damages suggested, in the highest and wildest estimates, are puny in comparison.

As soon as the demand appears for power on the Nelson River, and it is sure to appear soon, the figures used above to express the results and values must be doubled and trebled. To hesitate in the expenditure of a few hundred thousand dollars, for the cost of flowage rights and protective works, would be nothing less than crime against succeeding generations."

21.

That the court erred in sustaining petitioner's objection to respondent's offer to prove that the information and facts set forth in this printed brief, Respondent's Exhibit 33, were circulated among the residents of Lake of the Woods and Roseau Counties, and were known by such residents and by the property owners generally in those counties.

22.

That the court erred in sustaining petitioner's objection to respondent's offer of Respondent's Exhibit 36, being an editorial in Manitoba Free Press, of the city of Winnipeg, under date of June 3, 1922, the material portions of which are:

"To the Manitoba power plants on the Winnipeg river, present and prospective, it is vitally important that there should be a regular, dependable flow of water. Winnipeg's

municipal power scheme, the Manitoba Power Company's hydro-electric enterprise, the Winnipeg Electric Railway Company, and all future power concerns would be directly
46 affected if Mr. Backus were allowed to use the flow from the Lake of the Woods, as he proposes, or else to levy a toll, as he would be in a position to do, on the Manitoba power companies for allowing the flow which they required. Rates for light and power would have been forced up and the advantage which this city possesses with its exceedingly cheap power for industrial purposes would have been considerably discounted. But the "dependable flow" was not only desired by Manitoba, but was clearly by highly competent authorities to be the best system for Ontario also."

"Mr. Backus' interests last year fought against this restriction with all the resources at their command. They claimed that they could not properly carry on their proposed pulp industry at the Lake of the Woods if the 'dependable flow' plan were adopted and they could not have, intermittently, the maximum flow." * * *

"It is supposed that Premier Drury in re-introducing his bill thinks that he can secure enough support in the Legislature this time to carry it. If he does, the situation in regard to power development in the Lake of the Woods District will be definitely settled. Power development in Manitoba will also, as a result be able to go ahead without the menace of serious interference with the flow in the Winnipeg River or of the necessity of paying tribute to Mr. Backus. Mr. Backus will be able to proceed with his enterprise, forgetting about the imaginary handicap to which he says he is being subjected. And Mr. Peter Heenan, M. L. A. and his constituents in Kenora will realize in time that they are not going to suffer as a result of the regulating of power development in the manner proposed, but that their town and district will benefit from the control and protection that is being provided."

23.

That the Court erred in sustaining petitioner's objection to respondents' offer to prove that said editorial, Respondents' Exhibit 35, and the facts recited therein, were known to and discussed by the people living in Lake of the Woods and Roseau Counties.

24.

That the Court erred in sustaining petitioner's objection to the whole of respondents' Exhibit 34, being respondents'

offer to prove certain facts by the witness Adolph F. Meyer. Said exhibit was prepared and offered by respondents pursuant to order of the court made on motion of petitioner, after the Court had sustained petitioner's objection to oral testimony by Mr. Meyer. Said exhibit contains several offers of proof. Although the trial court excluded the entire exhibit, he expressly permitted his ruling and respondents' exception to apply separately to each separate offer of proof. Accordingly, for brevity and convenience, each offer contained in said exhibit, the rejection of which is assigned as error, will be given a separate assignment number on the margin hereof, without repeating in each instance the formal language assigning error.

47

The same procedure is followed with reference to the court's exclusion of respondents' Exhibit 35, 42 to 51 inclusive, and Exhibit 55. For the court's convenience petitioner's objections to the several offers are set forth verbatim.

25.

"Adolph F. Meyer.

"Respondents offer to prove by the witness Adolph F. Meyer that there are opportunities for the development of hydro-electric power at the outlets of the Lake of the Woods and in the Winnipeg River, which developments will derive substantial benefits from the utilization of the water storage of the Lake of the Woods reservoir, at the following sites:

Outlets of Lake of the Woods, with a head of 22 feet;

White Dog Falls and Boundary Falls, with a head of 45 feet;

Point Du Bois, with a head of 46 feet;

Slave Falls, with a head of 26 feet;

Seven Sisters, with a head of 66 feet;

McArthur Falls, with a head of 18 feet;

Great Falls, with a head of 56 feet;

Pine Falls, with a head of 37 feet.

That the total concentrated head of all of sites is 316 feet.

Mr. Harries: Subject to the right to make additional objections, with respect to the matters contained in the three

additional pages, which counsel has just handed to the Government counsel, the United States objects to the reception of the testimony of Adolphh F. Meyer upon the grounds stated in those two sheets attached to the copy of Mr.
48 Meyer's testimony, which are now presented to the reporter.

(Document marked General Government's Exhibit 98 for identification by the reporter.)

The Government objects to each item of the foregoing proposed offer of proof by respondents upon each of the following grounds as to each item of such offer or proof:

The objection on the part of the United States to the admission of such evidence is made upon the following grounds:

1. That such evidence is incompetent, irrelevant and immaterial.

2. That such testimony is highly speculative and conjectural for the following reasons:

(a) It erroneously assumes as an existing fact fixed costs of plant site, operation, personnel, taxes and finances without basis other than conjecture and speculation.

(b) It assumes as a fact that the full development of the power which such a reservoir is capable of producing and also erroneously assumes a market for the said power so assumed to be developed as a result of the assumed use of said basin and respondents land as a part thereof.

(c) It assumes the earning of large profits from the use of the power so assumed to be developed and used.

(d) It assumes the practicability of united in one ownership approximately 1573 separate parcels of land without the exercise of eminent domain.

(e) It erroneously assumes the full development of all the power of which said reservoir is capable and also
49 the constant employment of the same on [an] basis and fixed profit.

(f) It excludes the use of said power which said body is capable of producing under full development for municipal or other public purposes on a cost basis or small margin of profit.

3. That no sufficient foundation has been laid for the introduction of said testimony.

4. That such testimony does not go to the true measure of damages in this case; namely, the difference in market value of the property affected by the easement before and after such easement is imposed.

5. That such testimony presupposes and assumes as status of the titles to the said lands at variance with the status thereof at the time of the condemnation; that is to say, at the date of the filing of the awards of the Commissioners.

6. That respondents have not sustained the burden of first proving the practicability of unifying shore ownerships, as required by law.

The Government further objects to any such evidence upon the further grounds:

1. The multiplicity of titles to lands affected by petitions of the Government for condemnation pursuant to the treaty between the United States and Canada makes it utterly impracticable as a matter of law to unite them for reservoir purposes, except through the intervention of the power of eminent domain.

(a) The physical magnitude of the project embracing 78,081 acres of land distributed along a shore line of over 1500 miles of mainland shoreline, the ownership of 50 which is reposed in approximately 850 recorded fee owners of lands in the United States of whom many have died, leaving unknown heirs, or have disappeared to parts unknown, and approximately 723 private owners in the Province of Ontario, render the exercise of the power of eminent domain the sole practicable means of so regulating or lawfully affecting the levels of the lake.

2. Similarly, the multiplicity of titles to the land affected in this proceeding, pursuant to the said treaty between the United States and Canada makes it utterly impracticable as a matter of fact to unite them for reservoir purposes save by eminent domain.

3. The ownership by the United States of a vast acreage ranging from approximately 50,000 acres when the lands in question were first opened for entry to 11,000 acres of land at the time the present proceedings were instituted rendered it impossible for any private interest to acquire and exercise a lawful right to flood the margins of the lake or otherwise control its levels.

(a) The homestead law, (43 U. S. C. A. Sec. 162) Provides that lands in the public domain must be taken for the purpose of actual settlement and not for speculation.

(b) The Act of Congress of January 14, 1889, entitled "An Act for the relief and civilization of Chippewa Indians in the State of Minnesota," (25 statutes at large 644) provides that the agricultural lands acquired under the act "shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law."

51 4. That the ownership of a large part of the lands necessary for such reservoir and owned by the Province of Ontario, the Policy of which province is opposed to the acquisition of any exclusive right of control of power sites and said lake levels, render it extremely unlikely, if not wholly impossible, to acquire flowage rights on the Canadian shore.

5. That the shore lands bordering on the Lake of the Woods have been continuously subject to four separate governmental jurisdictions until July 15, 1930, and since that date subject to five governmental jurisdictions, each charged with the duty of protecting its own interests therein and to preserve and perform its own administrative policies, making it wholly impracticable for private interests to acquire flowage rights thereon.

6. That the Lake of the Woods is international and navigable boundary water, the right to regulate and control which reposes solely in the United States and the Dominion of Canada.

7. That under the laws of the Dominion of Canada the Lake of the Woods, at least to the extent thereof within the boundary of the Dominion of Canada, is wholly subject to the jurisdiction of the Dominion Government for the protection of navigation thereof.

8. The structures on the Lake of the Woods outlets controlling the regulation of the lake have been under government control from 1898 to the present time for the protection of navigation and this physical control of such outlets by a governmental agency in the interests of one of its prime functions, precludes the possibility of control of the lake levels by any other agency or interest.

9. The Lake of the Woods has been subject to inter-
52 national commitment, regulation and control since the treaty of 1909 with Great Britain, which estab-

lished the order of precedence of the various interests, with power in fourth place.

10. All Crown lands in the Provinces of Manitoba and Ontario were withdrawn in 1915 and 1920 from any disposition inconsistent with governmental control and regulations.

11. The Indian Act of the Dominion of Canada, requiring a majority consent from each band located on Indian reservations adjacent to said lake, of which there are [forth] in number, renders it wholly impracticable and unfeasible to contemplate successful negotiations with said Indian occupants leading to their consent to relinquishment in their reservations.

12. The interests on the part of those concerned in the level of the Lake of the Woods are varied and embrace navigation, fishing, lumbering, domestic and sanitary purposes and power and these interests require radically different stages and conditions of the levels of said lake, and because they are so radically different one from another they preclude the reasonable expectation that the same could be reconciled by any persons or concerns other than governmental authority.

13. Respondents' testimony on the reservoir value is inadmissible until proof is made of a reasonable possibility of uniting in one person or firm.

(a) Power to unify shore ownership.

(b) Right to control the levels of the lake.

(c). Physical control of the outlets of the lake, each of which it is absolutely impracticable to so much as contemplate except by the joint action of the National Sovereignties having jurisdiction of the Lake of the Woods.

53 14. That it is impracticable as a matter of law for any power interest to unify ownership on the margin of said lake because of the law of the State of Minnesota (Sections 8076 and 8077, Mason's Minn. Stat. 1927), forbidding foreign interests to acquire more than 90,000 square feet of land in Minnesota.

On the ground that it conclusively appears that the regulation of the levels of said lake can be maintained or controlled only by governmental agency and by the exercise of the power of eminent domain. In connection with this ground objection in addition to other matters before the Court, there is called to the attention of the Court:

1. Section 10437, Mason's Minn. Stat. 1927, providing that to drain or attempt to drain in any manner any lake or body of water meandered by the United States is a gross misdemeanor, and also,

2. Article 2, Section 2 of the Constitution of Minnesota and the Enabling Act of 1857, page XII, Mason's Minn. Stat. 1927, to the effect that water forming boundaries with other states shall be common highways and forever free.

Further in this same connection, attention is called to the Acts of Congress approved June 7 and July 1, respectively, 1898, (30 Stat. 67, 571, 576) expressly reserving to the United States the right to flow the lands involved herein without any liability therefor to any person so acquiring said land thereafter.

Objection is further made to the introduction of such evidence for the reason that even if it be assumed that the said Acts June 7 and July 1, 1898, respectively, are impliedly repealed by the Treaty of 1925: We have this situation:

54 1. Immediately upon the going into effect of the Treaty of 1925 all possibility of unifying shore ownership, except by the United States in the exercise of eminent domain, was foreclosed.

2. But subsequent to 1898 and up to the signing of the Treaty of 1925, the Acts of 1898 were certainly in full force and effect and expressly gave the United States the sole right to overflow the shore lands in aid of navigation. In the fact of this existing right no other agency could have acquired a flowage right for any purpose from 1898 to the date of the Treaty; after which it was still true that no agency except the United States could acquire a flowage right.

The offer of testimony by the respondents is objected to further on the ground that the union of properties necessary for the project is so impracticable that the possibility of such union could not affect the market value or price.

The Government objects to all testimony relative to the acquisition of shore lands because of their supposed value for storage purposes. The ground of this objection is that it matters not whether one or ten or twelve of these good people, or one hundred, or all of them were deceived into the belief that they could acquire lands on the shore of Lake of the Woods and thereby hope for some enhancement in their value on account of reservoir purposes—it matters not at all if all of them were deceived in that belief if as a matter of

law that could not have taken place, and unification could not have been completed, and there was no buyer in the market who could ever have undertaken to acquire those lands.

55 Mr. Harries: 1. The Government objects to the admission of this testimony (1) upon the ground that no foundation has been laid for proof of the foregoing facts by this or any other witness; (2) upon the ground that the witness has not been qualified to testify to the foregoing facts; (3) upon all the grounds stated at the opening of court January 27, 1931, beginning at page 233 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

26.

Mr. Lewis: 2. Respondents further offer to prove by said witness that it is practicable to develop a total of about 325,000 electrical horse power on a 24 hour basis at the said site with the regulated outflow from Lake of the Woods.

Mr. Harries: 2. The Government objects upon all the grounds stated at the opening of court January 27, 1931, beginning at page 233 of the record; and upon the ground that it is immaterial what power could be developed with regulated outflow from the Lake of the Woods unless competent proof is first made of the practicability of using such power, by first establishing (a) the market; (b) the cost of marketing; (c) the cost of developing a market; (d) the cost of producing and (e) that there exists no source of cheaper power.

The Court: The objection is sustained.

Mr. Lewis: Exception.

27.

Mr. Lewis: 3. Respondents further offer to prove by said witness that he knows the conditions in the regions in which it is practicable to distribute the electrical power generated at said power sites with respect to the existing demand and market and the possible further demand and market for such power. That during 1929 and 1930 there was a demand and market for the entire output of all power
56 plants then in operation, and because of difficulty in supplying such demand the power interests were asking that power users economize in the amount of power consumed. That recently another power unit has been completed so that there is at present some surplus of power. That

in his opinion, however, such surplus will all be taken up within a period of from three to five years, and that there will be a demand and market for all the power which can be developed at said sites within a comparatively short time.

Mr. Harries: 3. To this the Government objects that the same is purely speculative and conjectural, without adequate foundation; and wanting in proof of what power can now be developed from said sites.

The Court: The objection is sustained.

Mr. Lewis: Exception.

28.

Mr. Lewis: 4-a. Respondents further offer to prove by said witness that during the course of his investigations as consulting engineer for the International Joint Commission he calculated what would have been the average dependable outflow of water from the Lake of the Woods at its outlets under natural conditions. That said average dependable outflow under natural conditions would have been from 6500 to 7000 cubic feet per second.

4-b. Respondents further offer to prove by said witness that he has determined what the average dependable outflow is and will be from the Lake of the Woods with the lake utilized as a storage reservoir and the waters controlled as contemplated by the treaty. Said average dependable outflow is and will be a little more than 10,000 cubic feet per second, making an increase of 3,000 or 3,500 cubic feet per second over the average dependable outflow under natural condition.

57 4-c. Respondents further offer to prove by said witness that the continuous power that could be developed at the outlets of the lake, with the lake utilized as a storage reservoir and the waters controlled as contemplated by the treaty, would be increased, as compared with natural conditions, in the same relative proportion as the average dependable outflow, that is, about 50%.

Mr. Harries: 4-a-b-c. The Government objects to the admission of the testimony comprised in the three paragraphs last above written upon the ground that no proper foundation has been laid; there is no proof that the average dependable outflow under treaty control can be utilized at existing or future power sites; and upon the grounds stated beginning at page 233 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

29.

Mr. Lewis: 5. Respondents further offer to prove by said witness that from his connection and experience with hydroelectric projects in general, and especially those at the outlets of the Lake of the Woods and in the Winnipeg River, and from his acquaintance with the value of the Lake of the Woods storage reservoir and the hydroelectric projects at the outlets of the Lake of the Woods and in the Winnipeg River, and from his acquaintance with the demands for power in the territory available to the interests or authorities operating or controlling said projects, he has formed an opinion as to whether such interests or authorities would seek to acquire the flowage rights and easements contemplated by the treaty of 1925 if said treaty had not been entered into and if said easements were not being acquired by the United States. That in his opinion said interests or authorities would seek to acquire such flowage rights and easements.

58 Mr. Harries: 5. The Government objects to the admission of the foregoing proffered testimony on the grounds (1) that it is speculative, conjectural and without any foundation; (2) that it is immaterial what any given interest would "seek" unless final validity in relation to power interests is established for the doctrine "seek and Ye shall find"; and upon the grounds stated by the Government beginning at page 233 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

30.

Mr. Lewis: 6. Respondents further offer to prove by said witness that the reasons for his opinion stated in the last preceding offer of proof are as follows: That it is impossible to utilize the storage possibilities of the Lake of the Woods reservoir without flooding the shore lands in the State of Minnesota. That the value of the Lake of the Woods as a storage reservoir in the development of continuous power is so great that considerations of economy and good business, as well as the desire on the part of interests or authorities owning or controlling the power projects to be secure in the use and enjoyment of said reservoir, would require the acquisition by them of the flowage and storage rights and easements on the shore lands in Minnesota.

Mr. Harries: 6. The Government objects to the admission of the foregoing testimony on the ground that it is too indefinite to be a proper subject of legal proof; is specula-

tive and conjectural, without proper foundation; and further objects on all grounds stated by the Government beginning at page 233 of the record; and the testimony that it is impossible to utilize the storage possibilities of the Lake of the Woods reservoir without flooding the shore lands in
59 Minnesota is objected to as a false statement of what the witness would testify, and said witness Adolph F. Meyer established the falsity of said offer in an affidavit made part of this record in connection with this offer of proof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

31.

Mr. Lewis: 7. Respondents further offer to prove by said witness that from his experience and contacts with the acquisition and development of reservoir and power projects, he knows that there is an established custom and practice which is usually followed in arriving at the fair market value of flowage and storage rights and easements where the same are sought to be acquired through negotiation and purchased, and that he knows what such custom and practice is.

Mr. Harries: 7. Proof of the custom and practice usually followed is objected to as immaterial to the issues of this case where the same were not followed and as a matter of law could not be carried out.

The Court: The objection is sustained.

Mr. Lewis: Exception.

32.

Mr. Lewis: 8. Respondents further offer to prove by said witness that such custom and practice is as follows: That negotiations are carried on between the owner of the flowage rights and easements and the party desiring to acquire the same. That the owner is usually willing to sell but is not required to do so. The party desiring to acquire the easement is usually willing to buy but is not compelled to do so. Each party will exercise the best judgment that he possesses, based upon information he has, with the result that the parties will usually agree on a price which will be somewhere between the use value of the flowage right and easement to the purchaser and the use value of the
60 land to the landowner, which price will not be based on the needs of the purchaser or the profits which he will derive from the project nor on the value of the land to the owner but will represent a fair market value reached through negotiation and bargaining in the manner stated.

Mr. Harries: 8. The Government objects to the admission of the proposed testimony upon the grounds of objection last above stated; upon the ground that in this proceeding neither the use value of flowage rights nor use value of owners' lands is the true measure of damage; on the ground that the proposed testimony states a legal conclusion as to what constitutes fair market value.

The Court: The objection is sustained.

Mr. Lewis: Exception.

33.

Mr. Lewis: 9. Respondents further offer to prove by said witness that from his knowledge and experience he has an opinion as to whether the fair market value of the flowage easements contemplated by the treaty of 1925 would have been arrived at and the title to said easements acquired by the interests or authorities operating or controlling the power projects through negotiation and purchase, if the treaty had not been entered into and if the United States had not undertaken thereby to acquire such easements. That in his opinion the fair market value of said easements would have been arrived at and said easements acquired in the manner described in the last preceding offer of proof.

Mr. Harries: 9. The Government objects to the reception of the proposed proof upon the ground that it is not based upon the true measure of fair market value; that it assumes facts that are purely conjectural; and upon the ground that on the date of the Commissioners' awards in this proceeding and for four years prior thereto the treaty of 1925 precluded acquisition of easements by anyone other than the
61 present condemnor.

The Court: The objection is sustained.

34.

Mr. Lewis: 10. Respondents further offer to prove by said witness that in his opinion the title to said easements could and would have been acquired by the interests or authorities operating or controlling the power projects in accordance with the custom and practice described in the foregoing offers of proof. That the acquisitions of said easements by said interests or authorities could and would have been accomplished through the medium of a subsidiary American corporation or other American agency acting on behalf of or co-operating with the Canadian interests or authorities.

Mr. Harries: 10. The Government objects to the admission of the proposed proof upon the ground that it is speculative and conjectural; upon the ground that it contains conclusions of law; and upon all grounds stated by the Government beginning at page 233 of the record (which the reporter is asked to copy here in full):

"II. The objection on the part of the United States to the admission of such evidence is made upon the following grounds:

1. That such evidence is incompetent, irrelevant and immaterial.

2. That such testimony is highly speculative and conjectural for the following reasons:

(a) It erroneously assumes as an existing fact fixed costs of plant site, operation, personnel, taxes and finances without basis other than conjecture and speculation.

(b) It assumes as a fact the full development of the power which such a reservoir is capable of producing and also erroneously assumes a market for the said power so as-
62 sumed to be developed as a result of the assumed use of said basin and respondents' land as a part thereof.

(c) It assumes the earning of large profits from the use of the power so assumed to be developed and used.

(d) It assumes the practicability of united in one ownership approximately 1573 separate parcels of land without the exercise of eminent domain.

(e) It erroneously assumes the full development of all the power of which said reservoir is capable and also the constant employment of the same on an earnings basis and fixed profit.

(f) It excludes the use of said power which said body is capable of producing under full development for municipal or other public purposes on a cost basis or small margin of profit.

3. That no sufficient foundation has been laid for the introduction of said testimony.

4. That such testimony does not go to the true measure of damages in this case; namely, the difference in market value of the property affected by the easement before and after such easement is imposed.

5. That such testimony presupposes and assumes as status of the titles to the said lands at variance with the status thereof at the time of the condemnation; that is to say, at the date of the filing of the awards of the Commissioners.

6. That respondents have not sustained the burden of first proving the practicability of unifying shore ownerships, as required by law.

III. The Government further objects to any such evidence upon the further grounds:

63 1. The multiplicity of titles to lands affected by the petitions of the Government for condemnation pursuant to the treaty between the United States and Canada makes it utterly impracticable as a matter of law to unite them for reservoir purposes, except through the intervention of the power of eminent domain.

(a) The physical magnitude of the project embracing 78,081 acres of land distributed along a shore line of over 1500 miles of mainland shoreline the ownership of which is reposed in approximately 850 recorded fee owners of lands in the United States of whom many have died, leaving unknown heirs, or have disappeared to parts unknown, and approximately 723 private owners in the Province of Ontario, render the exercise of the power of eminent domain the sole practicable means of so regulating or lawfully affecting the levels of the lake.

2. Similarly the multiplicity of titles to the land affected in this proceeding, pursuant to the said treaty between the United States and Canada, makes it utterly impracticable as a matter of fact to unite them for reservoir purposes save by eminent domain.

3. The ownership by the United States of a vast acreage ranging from approximately 50,000 acres when the lands in question were first opened for entry to 11,000 acres of land at the time the present proceedings were instituted rendered it impossible for any private interest to acquire and exercise a lawful right to flood the margins of the lake or otherwise control its levels.

64 (a) The homestead law, (43 U. S. C. A. Sec. 162) provides that lands in the public domain must be taken for the purpose of actual settlement and not for speculation.

(b) The Act of Congress of January 14, 1889, entitled "An act for the relief and civilization of Chippewa Indians

in the State of Minnesota", (25 statutes at large 644) provides that the agricultural lands acquired under the act "shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law."

4. That the ownership of a large part of the lands necessary for such reservoir and owned by the Province of Ontario, the policy of which province is opposed to the acquisition of any exclusive right of control of power sites and said lake levels, render it extremely unlikely, if not wholly impossible to acquire flowage rights on the Canadian shore.

5. That the shore lands bordering on the Lake of the Woods have been continuously subject to four separate governmental jurisdictions until July 15, 1930, and since that date subject to five governmental jurisdictions, each charged with the duty of protecting its own interests therein, and to preserve and perform its own administrative policies, making it wholly impracticable for private interests to acquire flowage rights thereon.

6. That the Lake of the Woods is international and navigable boundary water, the right to regulate and control which reposes solely in the United States and the Dominion of Canada.

7. That under the law of the Dominion of Canada the Lake of the Woods, at least to the extent thereof within the boundary of the Dominion of Canada, is wholly subject to the jurisdiction of the Dominion Government for the protection of navigation thereof.

8. The structures on the Lake of the Woods outlets controlling the regulation of the lake have been under governmental control from 1898 to the present time for the protection of navigation and this physical control of such outlets by a governmental agency in the interest of one of its prime functions, precludes the possibility of control of the lake levels by any other agency or interests.

9. The Lake of the Woods has been subject to international commitment, regulation and control since the treaty of 1909 with Great Britain, which established the order of precedence of the various interests, with power in fourth place.

10. All Crown lands in the Province of Manitoba and Ontario were withdrawn in 1915 and 1920 from any disposition inconsistent with governmental control and regulations.

11. The Indian Act of the Dominion of Canada, requiring a majority consent from each band located on Indian reser-

vations adjacent to said lake, of which there are forty in number, renders it wholly impracticable and unfeasible to contemplate successful negotiations with said Indian occupants leading to their consent to relinquishment in their reservations.

12. The interests on the part of those concerned in the level of the Lake of the Woods are varied and embrace
66 navigation, fishing, lumbering, domestic and sanitary purposes and power and these interests require radically different stages and conditions of the levels of said lake, and because they are so radically different one from another they preclude the reasonable expectation that the same could be reconciled by any persons or concern other than governmental authority.

13. Respondents' testimony on reservoir value is inadmissible until proof is made of a reasonable possibility of uniting in one person or firm.

(a) Power to unify shore ownership.

(b) Right to control the levels of the lake.

(c) Physical control of the outlets of the lake, each of which it is absolutely impracticable to so much as contemplate except by the joint action of the National Sovereignties having jurisdiction of the Lake of the Woods.

14. That it is impracticable as a matter of law for any power interest to unify ownership on the margin of said Lake because of the law of the State of Minnesota (Sections 8076 and 8077, Mason's Minn. Stat. 1927) forbidding foreign interests to acquire more than 90,000 square feet of land in Minnesota.

IV. Such testimony by respondents is further objected to on the ground that it conclusively appears that the regulation of the levels of said lake can be maintained or controlled only by governmental agency and by the exercise and power of eminent domain. In connection with this ground of objection in addition to other matters before the court, there is called to the attention of the court:

1. Section 10437, Mason's Minn. Stat. 1927, providing that to drain or attempt to drain in any manner any lake or body of water meandered by the United States is a gross misdemeanor, and also,

67 2. Article 2, Section 2 of the Constitution of Minnesota and the enabling Act of [1957], page XII, Mason's

Minn. Stat. 1927, to the effect that water forming boundaries with other states shall be common highways and forever free.

Further in this same connection, attention is called to the Acts of Congress approved June 7 and July 1, respectively, 1898 (30 Stat. 67, 571, 576) expressly reserving to the United States the right to flow the lands involved herein without any liability therefor to any person so acquiring said land thereafter.

Objection is further made to the introduction of such evidence for the reason that even if it be assumed that the said Acts June 7 and July 1, 1898, respectively, are impliedly repealed by the Treaty of 1925: We have this situation:

1. Immediately upon the going into effect of the Treaty of 1925 all possibility of unifying shore ownership, except by the United States in the exercise of eminent domain, was foreclosed.

2. But subsequent to 1898 and up to the signing of the Treaty of 1925, the Acts of 1898 were certainly in ful' force and effect and expressly gave the United States the sole right to overflow the shore lands in aid of navigation. In the face of this existing right no other agency could have acquired a flowage right for any purpose from 1898 to the date of the Treaty; after which it was still true that no agency except the United States could acquire a flowage right.

The offer of testimony by the respondents is objected to further on the ground that the union of properties necessary
for the project is so impracticable that the possibility
68 of such union could not affect the market value or price.

The Government objects to all testimony relative to the acquisition of shore lands because of their supposed value for storage purposes. The ground of this objection is that it matters not whether one or ten or twelve of these good people, or one hundred, or all of them were deceived into the belief that they could acquire lands on the shore of Lake of the Woods and thereby hope for some enhancement in their value on account of reservoir purposes,—it matters not if all of them were deceived in that belief if as a matter of law that could not have taken place, and unification could not have been completed, and there was no buyer in the market who could ever have undertaken to acquire those lands."

The Court: The objection is sustained.

Mr. Lewis: Exception.

35.

Mr. Lewis: Respondents further offer to prove by said witness Adolph F. Meyer, that for a number of years before 1925, he was consulting engineer for the Keewatin Power Company and that he has been consulting engineer for said company from 1925 to the present time; that he is acquainted with the facts and circumstances leading up to and continuing through the negotiation and execution of the contract entered into between said Keewatin Power Company and the Government of the Dominion of Canada, and that he knows the desires and requirements of the interests and authorities operating and controlling the dams and projects at the outlets of said lake, regarding the use and control of said Lake of the Woods Reservoir, as such desires and requirements conflicted with the desires and requirements of the interests and authorities operating and controlling the projects in the Winnipeg River.

36.

69 Mr. Lewis: Respondents further offer to prove by said witness Adolph F. Meyer, that the interests and authorities operating and controlling the same and projects at the outlets of said lake, within the province of Ontario, at all times favored and required and now favor and require a different outflow and type of storage and control of the waters of said lake from those favored and required by the interests and authorities operating and controlling the projects in the Winnipeg River, within the Province of Manitoba.

37.

Mr. Lewis: Respondents further offer to prove by said witness that the difference between the outflow, and the type of storage and control favored and required by said Ontario interests and authorities, and those favored and required by said Manitoba interests and authorities, was substantial and fundamental, and was such as caused and would cause said Ontario interests and authorities to compete with said Manitoba interests and authorities for the right and power to develop and control said Lake of the Woods Storage Reservoir.

Mr. Harries: The Government objects to the foregoing testimony upon the following grounds: (1) It is too general and indefinite to be received in evidence; (2) The probabilities of competition are not a proper subject of expert testi-

mony by this witness; (3) The testimony is speculative; (4) no foundation has been laid for its introduction; (5) it is further objected to as immaterial; (6) The Government objects to testimony of a difference in interest between Ontario and Manitoba authorities as to outflow control, upon the ground that these differences would not put such authorities in competition for flowage rights; and objects to testimony of competition for the right to develop and control Lake of the Woods reservoir on these grounds; (a) competition for the right to develop the reservoir would not put said au-
70 thorities in competition for the lands on the American shore, but would go only to the Canadian governmental privilege of controlling the outlets; (b) there is no showing that such competition was reflected in market values on the south shore; (c) as a matter of law, such competition could not be reflected in market values on the south shore because of the impracticability of developing and controlling the reservoir without the intervention of eminent domain.

38.

Mr. Lewis: Respondents further offer to prove by the witness Adolph F. Meyer that prior to the signing of the treaty of 1925 and the negotiations leading up to said treaty the power capacities at the outlets of the Lake of the Woods and in the Winnipeg River deriving substantial benefits from the Lake of the Woods storage reservoir had already been developed to such an extent that the interests or authorities operating or controlling said power developments would, for the reasons stated in preceding offers of proof, have sought to acquire the flowage easements required for the Lake of the Woods reservoir if the treaty had not been entered into.

Mr. Harries: The Government objects to this testimony as a conclusion, without proper foundation, incompetent, irrelevant and immaterial.

The Government also objects to all of the proposed testimony of Adolph F. Meyer, and to each item thereof, upon each of the grounds stated on pages 613 to 620 A inclusive of the record immediately after the offer to prove previously made by means of the witness Adolph F. Meyer.

39.

"Respondents further offer to prove, by said witness Adolph F. Meyer, that for a number of years before 1925 he was consulting engineer for the Keewatin Power Company and that he had been consulting engineer for said company

from 1925 to the present time; that he is acquainted with the facts and circumstances leading up to and continuing through the negotiation and execution of the contract entered
71 into between said Keewatin Power Company and the Government of the Dominion of Canada, and that he knows the desires and requirements of the interests and authorities operating and controlling the dams and projects at the outlets of said Lake, regarding the use and control of said Lake of the Woods reservoir, as such desires and requirements conflicted with the desires and requirements of the interests and authorities operating and controlling the projects in the Winnipeg River.

"Respondents further offer to prove by said witness, Adolph F. Meyer, that the interest and authorities operating and controlling the dams and projects at the outlets of said lake, within the province of Ontario, at all times favored and required and now favor and require a different outflow and type of storage and control of the waters of said lake from those favored and required by the interests and authorities operating and controlling the projects in the Winnipeg River, within the province of Manitoba.

41.

"Respondents further offer to prove by said witness that the difference between the outflow and the type of storage and control favored and required by said Ontario interests and authorities, and those favored and required by said Manitoba interests and authorities, was substantial and fundamental, and was such as caused and would cause said Ontario interests and authorities to compete with said Manitoba interests and authorities for the right and power to develop and control said Lake of the Woods Storage Reservoir.

"The Government objects to the foregoing testimony upon the following grounds: (1) That it is too general and indefinite; (2) That probabilities of competition are not a proper subject of expert testimony by this witness; (3) the testimony is speculative; (4) no foundation has been laid for its introduction; (5) it is further objected to as immaterial; (6) The Government objects to testimony of a difference in interest between Ontario and Manitoba authorities as
72 to outflow control, upon the ground that these differences would not put such authorities in competition for the right to develop and control the Lake of the Woods reservoir on these grounds; (a) competition for the right to develop the reservoir would not put said authorities in com-

petition for the lands on the American shore, but would go only to the Canadian governmental privilege of controlling the outlets; (b) there is no showing that such competition was reflected in market values on the south shore; (c) As a matter of law such competition could not be reflected in market values on the south shore because of the impracticability of developing and controlling the reservoir without the intervention of eminent domain.

"Respondents further offer to prove by the witness Adolph F. Meyer that prior to the signing of the treaty of 1925 and the negotiations leading up to said treaty the power capacities at the outlets of the Lake of the Woods and in the Winnipeg River deriving substantial benefits from the Lake of the Woods storage reservoir had already been developed to such an extent that the interests or authorities operating or controlling said power developments would, for the reasons stated in preceding offers of proof, have sought to acquire the flowage easements required for the Lake of the Woods reservoir if the treaty had not been entered into.

"The Government objects to this testimony as a conclusion, without proper foundation, incompetent, irrelevant and immaterial.

"The Government also objects to all of the proposed testimony of Adolph F. Meyer, and to each item thereof, upon each of the grounds stated immediately after the offer to prove previously made by means of the witness Adolph F. Meyer."

73 Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 35.

(Document marked Respondents' Exhibit 35 for identification by the reporter.)

42.

Mr. Lewis: The respondents now offer to prove by the witness Clarence H. Nelson, the facts set forth in Respondents' Exhibit 35. And respondents also say that if the witness Clarence H. Nelson were permitted to testify, that he would testify as the facts are set forth in Respondents' Exhibit 35, Mr. Clarence H. Nelson being engineer for the Minnesota Tax Commission.

"Clarence H. Nelson.

II. Respondents offer to prove by the witness Clarence H. Nelson that he is a resident of the City of Minneapolis. That he was graduated from the University of Minnesota in

1925 with the degree of electrical engineer. That since his graduation he has been employed for a year and a half with the Public Service Company of Northern Illinois, with offices at Chicago, and that since February, 1927, he has been electrical hydraulic engineer for the Minnesota State Tax Commission.

43.

12. Respondents further offer to prove by said witness that he is acquainted with the custom and practice in the State of Minnesota in the taxation of flowage rights and easements.

13. Respondents further offer to prove by said witness that for a number of years last past the State of Minnesota and the various taxing authorities of said state and of the political subdivisions thereof in which waterpower of storage projects are located have taxed flowage rights and easements as separate and distinct property.

Mr. Harries: The Government objects to the offer on the grounds stated in the statement of objections attached
74 to the copy of the proposed testimony of Mr. Nelson, and I ask to have it marked as Government's Exhibit 99.

(Document marked Government's Exhibit 99 for identification by the reporter.)

13. The Government objects upon all of the grounds stated at the opening of court January 26, 1931 (record page 233); and upon the further grounds (1) that the mode of assessing taxes or determining elements of value for purposes of taxation is incompetent, irrelevant and immaterial; (2) that the proposed testimony contains conclusions of law for proof of which by this witness no proper foundation has been laid.

The Government also objects to all of the proposed testimony of Clarence H. Nelson and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer."

The Court: The objection is sustained.

Mr. Lewis: Exception.

75 Mr. Lewis: 14. "Respondents offer to prove by the witness W. E. King, duly sworn and on the stand ready to testify, that he is a graduate of the University of

Minnesota, 1905, with the degree of Civil Engineering; that he is a member of the American Society of Civil Engineers, the American Concrete Institute, the St. Paul Society of Engineers, and is a registered engineer licensed to practice said profession in the State of Minnesota. That said witness has been actively engaged in the engineering profession since the year 1905; that for two years he was employed by the American Bridge Company of Minneapolis, Minnesota, as an Engineer; for one year he served as engineer for the Minneapolis Steel & Machinery Company, and for one year as engineer in the Bridge Department of the Great Northern Railway Company; That during all other times since the year 1905 he has been and is now a practicing and consulting engineer. That said witness has had a wide and varied experience in power projects involving the purchasing and valuing of flowage easements; that among such projects to which he has given study and with which he has been actively engaged are the following: The construction of two dams in the Des Moines River near Humboldt, Iowa, where his duties consisted in the erection of such dams and in the valuing of the flowage easements purchased for reservoir purposes on such projects; that he supervised the construction of the dams at Rutland, Iowa, where his duties were similar to those described on the said project at Humboldt, Iowa; that he was called in as consulting engineer to assist in determining the value of flowage and stor-
76 age easements acquired by the Northern States Power Company on its project in the Mississippi River near St. Paul. That he has been consulted on numerous occasions with respect to valuing flowage and storage easement for the purpose of rate-making; that he was recently engaged in behalf of Morrison County, Minnesota, in the valuation of flowage and storage easements on the so-called Blanchard Dam Project and Little Falls Dam project, which valuations were made to determine the value of said flowage and storage easement for the purpose of taxation."

Mr. Harries: 14. The Government objects to any statement of qualifications to determine the valuation of flowage rights for the purposes of taxation as being immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

45.

Mr. Lewis: 15. Respondents further offer to prove by said witness that he knows that there is a custom and practice in the State of Minnesota and in other northwestern

states with reference to the purchase and conveyance of flowage easements. That it is the custom and practice in the State of Minnesota and other northwestern states to purchase, sell, and transfer flowage easements as separate and distinct units of property, and that for many years flowage easements have been regarded and dealt in in the State of Minnesota as such separate units of private property. That flowage easements are commonly recorded in the offices of the Register of Deeds of the several counties of Minnesota in like manner as other deeds of conveyance.

Mr. Harries: 15. The Government objects to this testimony of the witness as a conclusion of law, and without proper foundation; upon the ground that the custom and practice stated is not a proper measure of damage in this proceeding; on the ground that custom and practice is immaterial; and on the ground that the custom and practice proved must be the custom and practice at the time when and the place where the condemnation is exercised.

77

The Court: The objection is sustained.

Mr. Lewis: Exception.

46.

Mr. Lewis: 16. Respondents further offer to prove by said witness that he has been personally connected with the evaluation and assessment of flowage easements in the State of Minnesota, and that he has made a study of the practice of the taxing authorities in said state in assessing and taxing flowage easements. That he knows of his own knowledge that flowage easements are assessed and taxed as separate and distinct units of private property by the taxing authorities of various places in said state.

Mr. Harries: 16. To which the Government objects on the ground that the practice of taxing authorities is irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

47.

Mr. Lewis: 17. Respondents further offer to prove by said witness that there is a well established and generally recognized custom and practice among hydraulic engineers and owners and operators of projects involving flowage easements and reservoir, and among those charged with the responsibility of appraising the value of flowage easements.

That he knows what this custom and practice is. That this custom and practice is that the value of each storage reservoir and of the flowage easements required therefor is appraised and determined on the special facts and circumstances in connection therewith.

Mr. Harries: 17. To which the Government objects on the ground of objection to number 15.

78 The Court: The objection is sustained.

Mr. Lewis: Exception.

48.

Mr. Lewis: 18. Respondents further offer to prove by said witness that there is no market for flowage easements in the State of Minnesota and other northwestern states as the term "market" is commonly understood. That there is no market value in said region for flowage easements as the term "market value" is commonly understood. That from the nature of the projects for which flowage easements are required it is impossible for a market therefor to exist, because the value of each such project and of the flowage easements required therefor must be determined according to the special facts and conditions thereof.

Mr. Harries: 18. To which the Government objects on the ground that special facts and conditions are not the true measure of damage; and on the ground that the testimony of what constitutes a market or market value is a conclusion of law; as incompetent, irrelevant and immaterial, and without proper foundation; and upon each ground heretofore stated.

The Court: The objection is sustained.

Mr. Lewis: Exception.

49.

Mr. Lewis: 19. Respondents further offer to prove by said witness that the method uniformly used in appraising and determining the value of any easement for flowage or storage purposes according to the well established custom and practice which has been described by the witness and with which the witness is acquainted is to take into consideration the storage capacity of the reservoir in question, the location of the reservoir with reference to the place of utilization of the water stored therein, the extent to which and the manner in which the water can be utilized, the time which will be required therefor, and the economic practicability of the

development and operation of the necessary project
79 work. The determination of the value of the reservoir as a whole and of each component part thereof, including the value of the several flowage easements required, then becomes a matter of expert intelligence and professional judgment, based upon experience.

Mr. Harries: 19. To which the Government objects upon each ground heretofore stated and upon the further ground that the witness leaves out of account the vital consideration of the practicability of uniting ownership of the properties necessary for the project and deals only with the economic practicability of the development. The Government also objects to all of the proposed testimony of W. E. King and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 43.

(Document marked Respondents' Exhibit 43 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness Gardner S. Williams, the facts set forth as evidence in Respondents' Exhibit 43, and will state to the Court that if the witness Gardner S. Williams were permitted to testify that he would testify to the facts as set forth in said Exhibit 43.

Mr. Harries: The Government objects to the testimony of Gardner S. Williams on the grounds as stated in the sheets attached to the copy of the offered testimony of Mr. Williams, and I ask to have the document marked as Government's Exhibit 101.

(Document marked Government's Exhibit 101 for identification by the reporter.)

80 50.

Mr. Lewis: 20. Respondents offer to prove by the witness Gardner S. Williams as follows:

That he resides in Ann Arbor, Michigan, and is 64 years of age. That his present occupation is consulting engineer.

That he has had 43 years engineering experience. That he is a member of the following engineering societies:

Member American Society of Civil Engineers

" " " " Mechanical Engineers

" The Detroit Engineering Society, and others, and has been a Vice President of American Engineering Council for the past 7 years.

That he was educated in the public schools of Saginaw, Michigan, and at the University of Michigan, where he was graduated with degree of Bachelor of Science in Civil Engineering in 1889, and received advance degree of Civil Engineering in 1899. That he began work on local land surveys while in [collect] and in the summer of 1887 was engaged on water works construction at Bismarck, North Dakota, and similiarly in 1888 and 1889 at Greenville and Owosso, Michigan, respectively. That from 1889 to 1893 he worked for the Russel Wheel & Foundry Company of Detroit, a firm of manufacturing contractors in iron and steel; as draftsman and engineer, and from 1893 to 1898 was civil engineer to the Board of Water Commissioners of Detroit. That from 1898 to 1904, he was Professor of Experimental Hydraulics and Engineer in Charge of the Hydraulic Laboratory at Cornell University; and from 1904 to 1911 was Professor of Civil, Hydraulic and Sanitary Engineering at the University of Michigan, also carrying on a consulting practice from 1898. That he was appointed a member of the International Waterways Commission by President Roosevelt in 1903 and resigned therefrom in 1905. That since leaving the University of Michigan in 1911 he has been engaged in consulting work, mainly
81 along water power and water supply and other hydraulic lines; and has been called to practice in 21 states as well as the Canadian Provinces of Quebec and Ontario, the major part of his work being in Michigan, Illinois and Minnesota, in each of which he is registered to practice engineering. That among his important works in Michigan have been the design and construction of hydroelectric power plants for the Edison Sault Electric Company in the Rapids at Sault Ste. Marie, Michigan, with which he was connected from 1905 to 1916; the design and construction of a series of five hydroelectric power plants with local storage on the Huron River in Michigan for the Detroit Edison Company, between 1906 and 1926. Also the design and construction of hydroelectric plants for the City of Sturgis, Michigan, on the

St. Joseph River and for the Alpena Power Company on the Thunder Bay River in Michigan. That in Iowa he designed and supervised the construction of a dam across the Des Moines River at Des Moines, Iowa, for power and storage purposes. That in Illinois, his engagements have been mainly in connection with the constructions, hydraulic investigations and litigations of the Sanitary District of Chicago, including studies of the regulation of the international waters of the Great Lakes System. That in Minnesota in 1911-12 he was employed by the Corps of Engineers of the United States Army to design the substructure of the Power House at Lock and Dam No. 1 of the Mississippi River Improvement, which is located between Minneapolis and St. Paul, and which was constructed after the plans prepared by him, and in 1913 he was engaged as consulting engineer to design and supervise the construction of various storage dams for the Great Northern Power Company of Duluth, and continued in that relation until the property of the Company was sold in 1923,
during which time there were constructed the Island
82 Lake Storage Dam, the Boulder Lake Storage Dam
and the Whiteface Reservoir Dam, and extensive studies were made of possible equalization of the flow of the St. Louis River. That from 1916 to 1918 he was engaged in the reconstruction of the hydraulic power plants of the Watab Pulp & Paper Company, at Sartell, Minnesota, and in the water power and storage investigations in connection with that property. That he has been a witness in various litigations among which are:

The Drainage Canal Case, State of Missouri vs. State of Illinois, etc., in the U. S. Supreme Court. The Sanitary District Cases; U. S. vs. Sanitary District of Chicago, in the U. S. District Court for Northern Illinois.

The Chandler-Dunbar Water Power Case in the U. S. District Court for Western Michigan; Milwaukee vs. Western Foundation Co., in the U. S. District Court for Eastern Wisconsin; Wm. Cramp & Sons vs. Wellman-Seaver Morgan Co., in the U. S. District Court for Northern Ohio; Neely vs. Ford Motor Co., in the U. S. District Court for Eastern Wisconsin; Wisconsin et al. vs. Illinois & Sanitary District, before the U. S. Supreme Court, with Justice Charles Evan Hughes as Master.

That he has also been a witness in the state courts of Michigan, Illinois, Minnesota, Iowa, New York, Wisconsin and Virginia. That in cases involving valuations he was the

principal witness for the company in City of Ithaca vs. Ithaca Water Works Company for condemnation in New York. That he was a leading witness for the defendants in U. S. vs. Chandler Dunbar Water Power Company, et al. That he was also a witness in Loranger vs. City of Flint, a water diversion and drainage case in Michigan, and in City of Chicago vs. Sanitary District of Chicago, a sewer right of way
83 condemnation case in Illinois. Also in Marselles Water Power Co. vs. Northern Illinois Traction Co., a. water power valuation case in Illinois, and in Landowners vs. Watab Pulp and Paper Co., a flood damage case in Minnesota. Also in City of Pontiac vs. Commercial Milling Co., a water power condemnation case in Michigan; in Bryant Paper Co. vs. Monarch Paper Co., a flood damage case in Michigan; in Rayburn Lumber Co. vs. Alpena Power Company, a flood damage case in Michigan; and in Hubbell vs. Van Tine et al., a water storage and damage case in Michigan. That he was also the leading witness for the defendant in Warner Moore & Co. vs. Chesapeake and Ohio Ry. Co., a water supply damage case in Virginia, and has made several appraisals of property for sale or bonding purposes; That among the latter, for several years he made appraisals of the additions and betterments of the properties of the Great Northern Power Co. of Duluth, for bonding purposes, in which the betterments. etc. consisted of water power and storage lands and constructions, transmission lines and appurtenances, rights of way, power plants, etc. During the World War he was an Associate Member of the Naval Consulting Board and engaged on the survey for Industrial Preparedness of Michigan, in 1916, and was a Major in the Engineer Officers Reserve Corps, stationed at Camp Beauregard, La., on camp construction, and at Washington, in the constructing quartermaster's department, in 1917. That in the acquisition of lands for water power or reservoir purposes, in association with three other gentlemen, he acquired control of some 12,000 or 14,000 acres of water power lands in Michigan on the Tittabwassee and Tobacco Rivers comprising sites for five dams and power plants, making a reservoir development of the stream covering some 90 miles of river and trib-
84 utaries designed to equalize about 75 per cent of the flow of the stream, which involved the acquisition of about 400 parcels without the exercise of powers of eminent domain or any governmental assistance, there being no water power condemnation in Michigan at that time, which was between 1907 and 1917. That the property so acquired has been

since developed. That between 1906 and 1920 he had charge of the expenditure of nearly a million dollars for water power lands and rights on the Huron River in State of Michigan for the Detroit Edison Company, the prices paid for the latter lands and rights ranging from $16.00 to $400.00 per acre. Those properties were to a large extent secured for reservoir purposes as each plant was developed with as much storage above it as it was possible to get, and they consisted in part of flowage easement and in part of fee acquisitions.

51.

Mr. Lewis: 21. Respondents further offer to prove by the witness Gardner S. Williams that he has studied and acquainted himself with the report known as Water Resources Statement No. 3 of the Dominion Water Power Branch, Department of the Interior of Canada, published in 1915, entitled "Winnipeg River Power and Storage Investigation," by J. T. Johnson, also with the documents known as Water Power Resources Paper of the Department of the Interior of Canada, Dominion Water Power and Reclamation Surveys, Nos. 31, 54 and 57, as well as with a very large amount of other literature and engineering and statistical data and information relating to the power resources and developments of the Lake of the Woods and Winnipeg River. That he has personally visited and examined the Lake of the Woods and the Winnipeg River Power Projects, and that he knows the power capacities of the Lake of the Woods and the Winnipeg River and the extent of the development of such capacities up to the present time. That he has visited the City of Winnipeg and the villages of Kenora and Rainy
85 River and intervening points in Canada, and the villages of Warroad, Baudette, and intervening points in the State of Minnesota. That he is familiar with the character of the lands involved in these condemnation proceedings.

Mr. Harries: 21. The Government objects to so much of the statement of qualifications as is based upon Water Power Resource Papers on the ground that the same are hearsay, and no opportunity is afforded to cross-examine their author J. T. Johnston or other authors thereof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

52.

Mr. Lewis: 22. Respondents further offer to prove by said witness that he has heard or has read the official report-

er's transcript of all the testimony given by Adolph F. Meyer in this proceeding relating to the facts and conditions of the Lake of the Woods, of the watershed of said lake, of the storage reservoir of said lake, of the Winnipeg River, of the Power developments and other works in said lake and river, of the control that has been exercised and the use that has been made of the waters of said lake and river, and particularly of the storage reservoir of said lake by means of said power developments and other works, also the testimony of said Adolph F. Meyer as to the facts and conditions of the resources and capacities of all of said waters for power and other purposes.

53.

23. Respondents further offer to prove by said witness Gardner S. Williams that he has made a study of the advantage to be derived by the power projects at the outlets of the Lake of the Woods and in the Winnipeg River by the utilization of the storage possibilities of the Lake of the Woods in conformity with the provisions of the treaty of 1925.

54.

24. Respondents further offer to prove by said wit-
86 ness that the utilization of the storage capacity of the Lake of the Woods pursuant to said treaty will result in an increase of the continuous water horse power which can be developed by said water power projects of approximately 200,000 such horse power.

Mr. Harries: 22-23-24. The Government objects to the foregoing testimony upon each of the grounds stated immediately following the last of the offers of proof of respondents; and further objects to such testimony on the ground that the same is without proper foundation; and on the ground that the evidence is immaterial because there is no evidence that existing power plants can utilize the continuous flow from increased storage and so develop 200,000 additional horse power; nor that there is a market for the same.

The Court: The objection is sustained.

Mr. Lewis: Exception.

55.

Mr. Lewis: 25. Respondents further offer to prove by said witness that the significance and advantage of obtaining a constant stream flow and continuous horse power which would be obtained through the utilization of the storage capacity of said lake is that since there is no other available

source of power in the area furnishing a market for the output of the aforesaid developments sufficient to supply the required power at times when the output of said developments under natural conditions would be low, it is important to obtain a constant stream flow by utilizing the Lake of the Woods storage, thus making it possible to deliver a substantially uniform quantity of power from day to day and month to month, limiting the variation in the quantity of available power to a minimum.

Mr. Harries: 25. The Government objects to the foregoing testimony on the ground that the Court will take judicial notice of its falsity by reason of the available sources
87 of power on the English and Nelson Rivers sufficient to supply the same market without any resort to Lake of the Woods storage; and an additional source in the Saskatchewan River within 150 miles of Winnipeg capable of developing 325,000 horse power.

The Court: Objection sustained.

Mr. Lewis: Exception.

56.

Mr. Lewis: 26. Respondents further offer to prove by said witness that he has informed himself concerning the demand and market for power in the territory supplied from the aforesaid projects, and that he has found that the power requirements of said area are now or will be in the very near future sufficient to consume the entire output of said power projects with the full utilization of the storage capacity of the Lake of the Woods as contemplated by the treaty of 1925.

Mr. Harries: 26. The Government objects to the foregoing testimony on the ground that it is speculative and conjectural and without any foundation in the way of proof of what the market demand is or will be.

The Court: The objection is sustained.

Mr. Lewis: Exception.

57.

Mr. Lewis: 27. Respondents further offer to prove by said witness that he has studied the physical and international conditions and aspects of the Lake of the Woods storage reservoir with respect to the practicability of acquiring the flowage easements necessary to the development and utilization of said reservoir, and that he has formed an opin-

ion with reference thereto, based upon his said study and upon his knowledge and experience gained as stated in the foregoing testimony and offers of proof. That it is his opinion and firm belief that it would be entirely practicable for the
88 interests or authorities operating or controlling the power projects to acquire and unify the flowage easements necessary to the development and utilization of the Lake of the Woods storage reservoir as contemplated by the treaty of 1925.

Mr. Harries: 27. The Government objects to the foregoing testimony on the ground that it constitutes a conclusion of law on the part of the witness, is incompetent, and without foundation; that witness has not qualified as an expert in international diplomacy and has testified to no facts which would make him legally competent to give the foregoing opinion.

The Court: The objection is sustained.

Mr. Lewis: Exception.

58.

Mr. Lewis: 28. Respondents further offer to prove by said witness that it is his opinion and firm belief that if it were not for the treaty of 1925 and governmental action taken thereunder said interests or authorities would unquestionably have acquired the flowage easements necessary to the development and utilization of said storage reservoir, and that it would have been entirely practicable for them so to do.

Mr. Harries: 28. The Government objects to this testimony on the ground that it is without any foundation; is speculative and conjectural; and the opinion of the witness is immaterial, since as a matter of law the action of the interest described could not have affected the market value of the properties involved. The testimony is further objected to as a conclusion for which no foundation has been laid; and as being completely refuted by the fact that such authorities referred to did not even seek to acquire such easements.

The Court: The objection is sustained.

Mr. Lewis: Exception.

59.

Mr. Lewis: 29. Respondents further offer to prove by said witness that the reason for the opinion expressed
89 by him in the foregoing offer of proof is that said storage reservoir is of such substantial advantage and

benefit to the interests of authorities controlling or operating power projects at the outlets of said lake and in the Winnipeg River that it would be to their best interests as a matter of sound business policy to acquire said flowage easements.

Mr. Harries: 29. The Government objects to this testimony as speculative and conjectural and without any foundation by proof of knowledge of the costs of plant, site, operation, personnel, taxes, financing, marketability and possible earnings.

The Court: Objection sustained.

Mr. Lewis: Exception.

60.

Mr. Lewis: 30. Respondents further offer to prove by said witness that there is no general market and no general market value for flowage easements as those terms are customarily used and understood. That the fair value or the fair market value, as it is sometimes called, for flowage easements is, as a matter of common practice in connection with the projects involving such easements, arrived at on the basis of the particular facts and circumstances affects each individual case.

Mr. Harries: 30. The Government objects to the foregoing testimony except insofar as it corroborates the Government's testimony that market values have not been affected by the storage possibilities of the lake. The grounds of the objection are (1) that the statement that there is "no general market" is a conclusion of law, has no proper foundation and is incompetent; (2) that the absence of an "easement market" is immaterial in condemnation proceedings where the issue is the extent of damage to the entire
90 tract on which the easement is imposed; (3) that a common practice cannot overcome the well defined legal measure of market value as the differences in value of the whole property affected, before and after the taking.

The Court: The objection is sustained.

Mr. Lewis: Exception.

61.

Mr. Lewis: 31. Respondents further offer to prove by said witness that there is an established custom and practice in connection with such projects whereby the fair value, or

the so-called fair market value, of flowage easements is arrived at. That he knows that said custom and practice is, and that it is as set forth in the next preceding offer of proof.

Mr. Harries: 31. The Government objects to the admission of this testimony for the reason that it frankly admits that "fair value" is not the same as "market value"; and that all testimony of this witness as to values is therefore wholly incompetent.

The Court: The objection is sustained.

Mr. Lewis: Exception.

62.

Mr. Lewis: 32. Respondents further offer to prove by said witness that in his opinion, based upon his experience and knowledge, the fair value or so-called fair market value of the flowage easements necessary to be acquired for the utilization of the Lake of the Woods storage reservoir as contemplated by the treaty of 1925 would be arrived at, in accordance with said custom and practice, if said flowage easements were sought to be acquired by the interests or authorities operating or controlling the power projects, through the usual methods of negotiation and bargaining between the willing seller and a willing buyer, both fully informed and under no compulsion to buy or sell. That the fair value or so called fair market value so arrived at would be the result of the exercise of the best judgment on either side, and
91 would represent a value somewhere between the value of the lands to their owners and the value of the easements to the interests or authorities seeking to acquire them. That said fair value or so called fair market value would not be based upon nor determined by the necessities of the interests seeking to acquire them nor upon the profits or benefits which such interests might derive therefrom, nor would it be based upon the use which the owners of said lands might at the time be able to make thereof, but that it would be determined and arrived at in the manner above described.

Mr. Harries: 32. The Government objects to this testimony as a conclusion of law; as being without proper foundation; that the method named refers to an entire reservoir collectively, and not to individual parts thereof and has no relation to taking easement by condemnation; and upon the ground that it is immaterial since the impossibility of unifying ownership of the necessary rights on the lake shore preclude the allowance of any added value by reason of storage possibilities, as a matter of law.

The Court: The objection is sustained.

Mr. Lewis: Exception.

63.

Mr. Lewis: 33. Respondents further offer to prove by said witness that from his said knowledge and experience and particularly from his acquaintance with the facts and circumstances affecting said flowage easements and the development of said storage reservoir, he has formed an opinion as to the fair value or so called fair market value of the three flowage easements involved in these proceedings.

Mr. Harries: To which the Government objects as immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

92 64.

Mr. Lewis: 34. Respondents further offer to prove by said witness that the fair value or so called fair market value of the flowage easements upon the respective lands of the respondents in the present proceeding is as follows:

On the lands of Elias Olson, $10,800;

On the lands of Harry Brewster, $13,300;

On the lands of Randor G. Karlson, $9,400.

Mr. Harries: 34. The Government objects to the foregoing testimony upon the grounds that (1) "so called fair market value of the flowage easements" is not a proper measure of value; (2) that the value of an easement is not a proper measure of damage in condemnation proceedings but the difference in value of the entire tract must be considered; (3) that no proper foundation has been laid; (4) that the testimony is incompetent; (5) that upon each ground hereinafter stated as an objection to each item in respondents' offer of proof and set forth in full at pages (insert page numbers where objections appear following Meyer's testimony) of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

65.

Mr. Lewis: 35. Respondents further offer to prove by said witness that he has considered the fair values or so called fair market values of said flowage easements as set

forth in the foregoing offers of proof, together with the corresponding fair values or so called fair market values of all the other flowage easements necessary to the development and utilization of said reservoir, as compared with the results which may be derived by the purchasers from the acquisition and utilization of said easements, and also with the use or uses to which the owner of said lands might devote the same for other than flowage purposes.

Mr. Harries: 35. The Government objects to this
93 testimony upon the ground that the witness has not shown himself qualified to appraise uses of the lands for purposes other than power.

The Court: The objection is sustained.

Mr. Lewis: Exception.

66.

Mr. Lewis: 36. Respondents further offer to prove by said witness that he has made the comparison mentioned in the preceding offer of proof for the purpose of checking the soundness of his opinion as to the fair value or so called fair market value of said easements, and for the purpose of checking the soundness of his opinion that the interests or authorities owning or controlling the power projects would acquire and utilize said flowage easements, if the United States had not undertaken by the treaty to acquire the same.

Mr. Harries: 36. To which the Government objects upon the ground that the witness is lifting himself by his bootstraps and checking his opinion by his comparison and his comparison by his opinion.

The Court: The objection is sustained.

Mr. Lewis: Exception.

67.

Mr. Lewis: 37. Respondents further offer to prove by said witness that as a result of his checking and comparisons made as set forth in the foregoing offers of proof, based upon his knowledge and experience, he has determined that the advantage and benefit which will be derived by the interests or authorities operating and controlling said power projects on account of the utilization of said flowage easements and said reservoir will exceed in value by more than two fold the entire amount which said flowage easements required for said reservoir would cost, based upon their fair values or so called fair market values arrived at in the manner heretofore described by said witness.

Mr. Harries: 37. To which the Government objects
94 upon the ground that it assumes the cost of acquiring flowage easements.

The Court: The objection is sustained.

Mr. Lewis: Exception.

68.

Mr. Lewis: 38. Respondents further offer to prove by said witness that the interests or authorities utilizing said flowage easements and said reservoir would reasonably be able to realize an additional annual profit or benefit as a result of such utilization exceeding $1,200,000, after allowing interest at the annual rate of eight per cent on the investments required for the acquisition of said flowage easements and reservoir on the basis of the values arrived at as heretofore described.

Mr. Harries: 38. The Government objects to this testimony upon the ground that no foundation has been laid; and that the testimony is speculative and conjectural and based upon facts not in evidence; that it assumes without any proof the cost of developing power, the effect of rate-fixing, operation and capital costs, and is incompetent; it assumes an annual rate of earnings without foundation by proof of market possibilities; does not include the time for which such earnings may be expected to continue; and is irrelevant because as a matter of law no undertaker could make the development because of the impossibility of unifying the necessary shore rights. The Government also objects to all of the proposed testimony of Gardner S. Williams and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: And in that connection, I will state to the Court that we will have a very short additional offer
95 to prove by Mr. Williams, which we will present to counsel right after lunch.

The Court: Very well.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 44.

(Document marked Respondents' Exhibit 44 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness Linus Landby the facts set forth in evidence in Respondents' Exhibit 44, and state to the Court that if the witness Linus Landby were permitted to testify that he would testify to the facts set forth in said exhibit.

Mr. Harries: The Government objects to the offered testimony upon the grounds set forth in the typewritten sheet attached to copy of the offered testimony of Mr. Landby, and I understand that the reporter will mark as exhibits all of the objections presented by the Government, so that they may appear following the testimony offered on the part of the respondents.

And I ask to have this marked as a Government's Exhibit.

(Document marked Government's Exhibit 102 for identification by the reporter.)

69.

Mr. Lewis: 39. Respondents offer to prove by the witness Linus Landby, duly sworn and on the stand ready to testify, that he has been a resident of Roseau County, Minnesota, for more than twenty years. That he is a farmer. That he is a son of A. M. Landby, who is a former state senator from Roseau County, and who was one of the residents of said county who took part in attempting to establish the rights of the owners of property flooded by the waters of the Lake of the Woods to compensation and damages for the use of said property for flowage and storage purposes. That during the year 1924 said Linus Landby purchased a tract of 120 acres, practically all of which is below contour 1064 on the shore of said lake. That
96 said tract does not adjoin his farm upon which he resides, but is a considerable distance therefrom. That he purchased said tract solely because it was valuable and was reputed to be valuable for flowage and storage purposes. That he paid a larger sum for said tract than he otherwise would have paid on account of the fact that it was valuable and was reputed to be valuable for flowage and storage purposes. That he would not have purchased said tract at all except for such value and reputed value.

Mr. Harries: 39. To which the Government objects upon the ground that the self-deception of the witness, and his ignorance of the law which had already conferred upon the United States a right to overflow his lands in aid of navigation to an unknown height, and his ignorance of other obstacles which rendered it impracticable as a matter of law

to unify the ownership required for a reservoir, render it immaterial why he bought or that he paid more than he would have paid had he actually known the facts of which he was aware constructively, and in legal effect. The Government also objects to all of the proposed testimony of Linus Landby and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The Government's objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 45.

(Document marked Respondents' Exhibit 45 for identification by the reporter.)

Mr. Lewis: Respondents now offer to prove by the witness Theodore F. Spreiter the facts set forth for evidence in Respondents' Exhibit 45, and I will state to the Court that if such witness were permitted to testify that he
97 would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to such testimony upon the grounds as stated in the sheet attached to the copy of the proposed testimony of Mr. Spreiter, and ask to have it marked as Government's Exhibit 103.

(Document marked General Government's Exhibit 103 for identification by the reporter.)

70.

Mr. Lewis: 40. Respondents offer to prove by the witness Theodore F. Spreiter, duly sworn and on the stand ready to testify, that he is a resident of the village of New Port, Washington County, Minnesota, and is president of the Farmers Terminal State Bank of said village. That from 1912 to 1918 he was a resident of the village of Warroad, Roseau County, Minnesota, and was the organizer and cashier of the Security State Bank of said village. That through his connection with said bank he became acquainted with certain sales and transfers of land along Lake of the Woods below contour 1064 in said county during said period. That the number of said sales was small. That in each instance with which he was familiar the sale and transfer was made as a forced sale and because the grantor was in financial distress.

Mr. Harries: 40. The Government objects to this testimony upon the following grounds: (a) neither the number of sales nor the fact of sales below contour 1064 is material because the lands affected lie above as well as below the level; (b) financial distress is a mental state as to which the witness is not qualified to testify; (c) witness does not profess to be familiar with all sales (d) the characterization of sales as "forced" is a conclusion of law and/or fact and oral testimony is not the best evidence thereof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

71.

Mr. Lewis: 41. Respondents further offer to prove by said witness that he knows of two or three such forced
98 sales wherein the purchaser purchased the land in question solely because of its value and reputed value for flowage and storage purposes, and that he knows of his own knowledge that the purchaser paid a higher price for the land than he would have paid except for the fact that the land was valuable and was reputed to be valuable for flowage and storage purposes;

Mr. Harries: 41. The Government objects to this testimony on the ground that motive of purchase is immaterial; and no foundation has been laid for proof thereof; on the ground that reputed values are immaterial if in fact such reputation was false because the required land could not be unified save by the joint action of National Sovereignties and if the hope engendered by such false repute was as a matter of law so speculative and conjectural that it could not influence market values. That such false repute ignored existing laws conferring a right of flowage on the United States in aid of navigation to an unknown water level and hence the hope of unification could not as a matter of law enhance market values. The Government also objects to all of the proposed testimony of Theodore F. Spreiter and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The Government's objection will be sustained.

Mr. Lewis: Exception.

Mr. Lewis: I now ask to have this document marked as Respondents' Exhibit 46.

(Document marked Respondents' Exhibit 46 for identification by the reporter.)

Mr. Lewis: The respondents next offer to prove by the witness Barney Arneson the facts recited and set forth in Respondents' Exhibit 46, and state to the court that if said witness Barney Arneson were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to such testi-
99 mony upon the grounds as stated upon the two typewritten sheets attached to the copy of the proposed testimony of Barney Arneson, and I ask to have it marked as General Government's Exhibit 104.

(Document marked General Government's Exhibit 104 for identification by the reporter.)

72.

Mr. Lewis: 42. Respondents offer to prove by the witness Barney Arneson, now on the stand, that he has been a resident of Warroad, Minnesota, since 1897. That he lives on a farm in the vicinity of the village of Warroad and that he is also engaged in the fishing industry. That he is a married man with a family and that he owns several pieces of property both within and without the village of Warroad.

73.

43. That he remembers the completion of the Norman Dam and the putting in of the stop logs in said dam during the year 1898. That he filed on a homestead in Roseau County not far from the village of Warroad in 1898, and that during the year 1899 his land, as well as other low-lying lands adjacent to the source of the Lake of the Woods, was flooded by the waters of said lake due to the presence and operation of the Norman Dam at one of the outlets of said lake.

74.

44. That during the year 1899 and 1900 the property owners along the shores of the Lake of the Woods had made inquiry and investigation to ascertain the cause of said flooding and at that time learned that said lake was being used as a storage reservoir for the development of water power.

75.

45. That on discovering that the waters of the Lake of the Woods were used for power purposes and that said lake was being used as a storage reservoir and that the ad-

jacent lands were being flooded and were used by the power companies to form said storage reservoir, it became a matter of common report, reputation, rumor and conversa-
100 tion among said property owners and among the residents in said area generally that the lands so flooded were of great value for storage purposes and bore such reputation, and that the said lands so flooded were more valuable than were the higher lands which were not flooded and that their highest value was for flowage purposes. That said lands so flooded were used by the power companies owning and operating the said Norman Dam and shortly thereafter were used by other companies owning and operating dams and power plants at the other outlets of said lake and in the Winnipeg River as and for a storage reservoir to equalize the flow of said water for power purposes.

Mr. Harries: 42, 43, 44, 45. The Government objects to the foregoing testimony upon the grounds that rumors, etc., of value for flowage purposes and common report that such values were highest are immaterial, since such rumor and report could not, as a matter of law, be reflected in market values because of the impracticability of unifying ownership of the flowage rights.

The Court: The objection is sustained.

Mr. Lewis: Exception.

76.

Mr. Lewis: 46. That during the years 1903, 1904 and 1905 the said property owners organized themselves into an association for the purpose of controlling the use value of their said properties which were so being flooded and used by said power companies, and for the purpose of obtaining relief from said continued trespass on their property by bringing about either a discontinuance of said trespass or the payment of just compensation therefor. That said association employed counsel to advise and to represent them, and that among the counsel so employed were Mr. William Taylor, The Honorable Halvor Steenerson, Member of Congress from the Ninth Minnesota Congressional District, Honorable Charles Loring, now a member of the Su-
101 preme Court of the State of Minnesota, the Honorable G. A. Youngquist, now assistant United States Attorney General, C. E. Berkman, Esq., an attorney at law, Chisholm, Minnesota, Messrs. Middleton & Middleton, Attorneys at Law of Baudette, Minnesota, Honorable Albert Chilgren, Attorney at Law of Baudette, Minnesota, Mr. Bert Hanson, The Honorable Julius J. Olson, now a judge of the district

court of the State of Minnesota for the fourteenth judicial district, and the attorneys of record in these proceedings.

Mr. Harries: 46. Objected to as immaterial.

The Court: Objections sustained.

Mr. Lewis: Exception.

77.

Mr. Lewis: 47. That the said property owners at all times since 1903 or 1904 have been associated together and organized and have been represented by legal counsel. That during all of said period from 1899 down to the present time, it has been a matter of common report, rumor, reputation and conversation among the said property owners and other residents of said area that the said lands so flooded possessed a high value for flowage purposes and that they were more valuable for flowage purposes than for any other purpose. That during substantially all of said period it was a matter of common report, rumor, reputation and conversation among said property owners and other residents of said area that the use of said lands for flowage and storage purposes as so made by said power companies entitled the owners of said land to recover substantial compensation and damages on account of said use.

Mr. Harries: 47. To this testimony the Government objects on the same grounds as stated in its objection to paragraphs 42, 43, 44 and 45.

The Court: The objection is sustained.

Mr. Lewis: Exception.

78.

Mr. Lewis: We further offer to prove by the said
102 witness Barney Arneson that for a long period of years he has served as official assessor of large areas bordering on the shores of the Lake of the Woods and that accordingly he became intimately acquainted with said properties so flooded and the owners thereof; that he has during all of said times made a close observation and study of transfers of property within the said area so flooded and that he has never known or heard of a flowage easement being bought or sold along the shores of the Lake of the Woods.

Mr. Harries: 48. To which the Government objects upon the ground that such testimony is immaterial and does not go to the proper measure either of damages or market value, inasmuch as the award in condemnation must be based on the

diminution of value of the entire tract affected and not upon the market price of a flowage easement.

The Court: The objection is sustained.

Mr. Lewis: Exception.

79.

Mr. Lewis: 49. Respondents further offer to prove by said witness Arneson that the sale and transfer of lands within said flooded area had been extremely infrequent and that he has conducted an investigation and has ascertained the facts and circumstances surrounding a large number of said transfers and that in practically every instance of such transfer the said transfer was made on account of financial distress or as a forced sale.

Mr. Harries: 49. Objected to as contradictory; a "large number" and "extreme infrequency" cannot co-exist; objected to as not the best evidence of "forced sales", as incompetent in alleging the state of mind described as "financial distress",—it may have been only embarrassment.

The Court: Objection sustained.

Mr. Lewis: Exception.

80.

Mr. Lewis: 50. Respondents further offer to prove
103 by said witness Arneson that in many of the sales and transfers referred to in the foregoing paragraph and offer of proof, the witness knows that said sales and transfers were made to persons who acquired said properties on account of their value for flowage and storage purposes; that in each instance the person so purchasing and acquiring said lands which had been so flooded paid a large price therefor on account of their value and reputed value for flowage purposes, and that except for the fact that said lands were reputed to be valuable for flowage purposes the persons so acquiring the same would not have purchased them at all.

Mr. Harries: 50. To which the Government objects upon the following grounds: It is immaterial that the buyers referred to acted under a mistake of law as to the practical possibility that adaptability for flowage could or did affect the market value of the property transferred.

The Court: The objection is sustained.

Mr. Lewis: Exception.

81.

Mr. Lewis: 51. Respondents further offer to prove by said witness Arneson that in the year 1920 he owned and resided on his own homestead, upon which he had filed in the year 1898 or thereabouts, and on which he had resided ever since, which were riparian lands bordering on said lake, and that during said year he purchased a tract of 160 acres practically all of which was below contour 1064, and that he purchased the said tract because of its value and reputed value for flowage and storage purposes, that he paid a larger price therefor than he would have paid except for said flowage and storage value and that he would not have purchased said tract at all except for the fact that he considered it valuable for flowage and storage purposes.

Mr. Harries: 51. To which the Government objects on the ground last above stated.

104 The Court: The objection is sustained.

Mr. Lewis: Exception.

82.

Mr. Lewis: 52. Respondents further offer to prove by said witness Arneson that the owner of said tract of land which he purchased, as mentioned in the foregoing paragraph and offer to prove, was in financial distress at and prior to said sale and transfer; that a mortgage was due against said lands and that the said sale and transfer was made on account of said owner's inability to meet the payments due on said mortgage,

Mr. Harries: 52. The Government objects to this as not being the best evidence; as immaterial; and on the ground that financial distress is not a gauge of market value, and as belying the claim in paragraph 51 that witness paid more than he otherwise would.

The Court: The objection is sustained.

Mr. Lewis: Exception.

83.

Mr. Lewis: 53. Respondents further offer to prove by said witness Arneson that during the time when the investigations and hearings were being conducted by the International Joint Commission at Warroad and elsewhere with reference to Lake of the Woods prior to 1917, he attended a num-

ber of said hearings and testified as a witness thereat; that on numerous occasions he heard members and advisers of said International Joint Commission state in public meeting attended by a large number of property owners and residents of said area that said lands so flooded were more valuable for flowage and storage purposes than for any other purpose and that when the power resources of said Lake of the Woods basis were fully developed the flowage and storage rights of said lands so flooded would possess a value beyond the fondest dreams of their owners; that said witness Arneson, as well as a large number of other property owners, stated to said International Joint Commission that he and they would not sell their said lands so flooded for any price representing their value for agricultural purposes.

Mr. Harries: 53. Objected to on the ground that "fondest dreams" are not a measure of market value, and statements to the International Joint Commission are immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

84.

Mr. Lewis: 54. Respondents further offer to prove by said witness Arneson that following the publication and circulation of the final report of said International Joint Commission in the year 1917, it was a matter of common report, rumor, reputation and conversation among the people generally residing in said area and among said property owners that said International Joint Commission had found and reported that the said lands so flooded were more valuable for flowage and storage purposes than for any other use or purpose.

Mr. Harries: 54. Objected to on the ground that rumor is not evidence, and the stated findings of the International Joint Commission are not the best evidence, and are immaterial; and its finding of a higher "use value" for storage is not a measure of market value. The Government also objects to all of the proposed testimony of Barney Arneson and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection will be sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 47.

106 (Document marked Respondents' Exhibit 47 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness H. M. Heneman, the facts set forth for evidence in Respondents' Exhibit 47, and state to the Court that if said witness were permitted to testify, that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to the testimony of H. M. Heneman on the grounds as stated in the two typewritten sheets attached to the copy of his proposed testimony.

And may the record show, Your Honor, that the objections on the part of the Government go to each specific item of proof offered by the respondents, as stated in the typewritten statements of objection.

And I ask to have the document marked as Government's Exhibit 105.

(Document marked Government's Exhibit 105 for identification by the reporter.)

85.

Mr. Lewis: 55. Respondents offer to prove by the witness H. M. Heneman, duly sworn and on the stand ready to testify, that he is a resident of the village of Warroad, Roseau County, Minnesota, and is cashier of the Security State Bank of said village, and has been such for 13 years last past. That during his entire period of residence in said village he has been familiar with the common report, reputation, and conversation among the people of said village and vicinity concerning the lands below contour 1064 on the shores of the Lake of the Woods which have been and are flooded and used for flowage and storage purposes in connection with the formation and maintenance of the Lake of the Woods storage reservoir. That for a number of years he has been secretary and treasurer of Cloverleaf Federal
107 Farm Loan Association. That in connection with his duties as cashier of said bank and as secretary of said association, he became and was during the entire period of his said residence in said village familiar with a very large proportion of the sales and transfers of property in the vi-

cinity of Lake of the Woods in said Roseau County during said time.

Mr. Harries: 55. The Government objects to the reception of the proposed proof on the ground that it assumes a common report, reputation and conversation without proof thereof; that such report, reputation and conversation are immaterial, irrelevant and incompetent; that these condemnation proceedings are not limited to lands below contour 1064.

The Court: The objection is sustained.

Mr. Lewis: Exception.

86.

Mr. Lewis: 56. Respondents further offer to prove by said witness that only a very small number of sales and transfers of land below contour 1064 have been made in Roseau County during the period of his said residence in said county. That he personally is acquainted with the facts and circumstances connected with a very large proportion of such transfers. That he knows of his own knowledge that in the large majority of cases such sales and transfers as have been made on lands below contour 1064 were made for the reason that the grantors were in financial distress and that such sales were made under such circumstances as to make them forced sales.

Mr. Harries: 56. The Government objects to this testimony on the ground that the number of sales of lands below contour 1064 is immaterial; that the financial distress of the grantors of such lands or any other lands is immaterial; that testimony by this witness as to the state of mind of the grantors is incompetent, and no foundation has been
108 laid for proof thereof; that the characterization of sales as forced sales is a conclusion for which no foundation has been laid, and is not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

87.

Mr. Lewis: 57. Respondents further offer to prove by said witness that he has never known or heard of a flowage easement being either bought or sold in Roseau County. That he is familiar to some extent with the transfers of land in the vicinity of Lake of the Woods in Lake of the Woods County, and that he has never known or heard of a flowage easement being either bought or sold in said county.

Mr. Harries: 57. The Government objects to this testimony as being immaterial and as not going to the proper measure of damage in this condemnation proceeding; and on the ground that the testimony has no tendency to prove that no such sales have been made; and upon the grounds stated by the Government at pages 233 to 242 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

88.

Mr. Lewis: 58. Respondents further offer to prove by said witness that in a number of cases of the sale and transfer of tracts of lands in Roseau County including lands below contour 1064, he directly assisted and counseled the parties in connection with the transaction, and has personal knowledge of all the details thereof. That in connection with said sales and transfers including lands below contour 1064 the use and value of such lands for flowage and storage purposes constituted a material consideration affecting such sales and transfers. That such use and value for flowage and storage purposes caused the purchasers in said transactions to pay a higher price for said lands than they otherwise would have paid except for such use and value. That the value
109 and reputed value of said lands below contour 1064 for flowage and storage purposes was a subject of negotiation in the consummation of said sales and transfers.

Mr. Harries: 58. The Government objects to this testimony as being too indefinite to be considered; as being hearsay and a conclusion as to the causes of prices paid; on the ground that the use of the lands in Roseau County constituting a part only of the lands required for a reservoir; and leaving out of account lands in Lake of the Woods County; and Canada; cannot furnish any measure of the value of any separate tract or group of tracts less than the whole number required.

The Court: The objection is sustained.

Mr. Lewis: Exception.

89.

Mr. Lewis: 59. Respondents further offer to prove by said witness that only a very small number of sales and transfers of lands below contour 1064 have been made in Roseau County during the period of his residence. That he is per-

sonally acquainted with a large percentage of such sales and transfers, and that by far the larger portion of said sales and transfers with which he is familiar were made for the reason that the grantors therein were in financial distress, and that said sales were in fact forced sales. That the sales and transfers referred to in the consummation of which he participated were likewise forced sales, and were made for the reason that the grantors therein were in financial distress.

Mr. Harries: 59. The Government objects to this testimony on the ground that the distress of the grantors is immaterial and no foundation has been laid for proof of the mental state of the grantors; that the description of sales as "forced" is a conclusion and not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

110 90.

Mr. Lewis: 60. Respondents further offer to prove by said witness that during the period of his residence in Roseau County he was familiar with a large proportion of the sales and transfers of real estate in the vicinity of Lake of the Woods in said county, and that he never knew or heard of a flowage easement being bought or sold.

Mr. Harries: 60. The Government objects to this testimony as immaterial; as not going to the true measure of damage, which must be based upon the effect of the taking upon the entire tract and must not be limited solely to the land within the physical boundaries of the space that is overflowed; for the easement carries with it all incidental appurtenances and involves all consequential damage. For example, if the easement cut off a road leading to the land on which the easement was imposed, or submerged the foreshore of a cliff so that boats could no longer land on the property, these facts must be regarded in appraising the damage. If it be said that the road and boat landing are not involved in the highest use to which the land is adapted, respondents is thrown back on the basic claim that availability could not, as a matter of law, affect market prices because of the practical impossibility of uniting ownership of all lands or even of all easements except by the intervention of eminent domain. The Government also objects to all of the proposed testimony of H. M. Heneman and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer."

The Court: Yes, the record may so show, and the objection will be sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 48.

111 (Document Marked Respondents' Exhibit 48 for Identification by the Reporter.)

Mr. Lewis: Respondents offer to prove by the witness Halvor Robberstad the facts set forth in Respondent's Exhibit 48 and state to the Court that if Mr. Robberstad were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to such testimony upon the grounds set forth in its written statement of objections attached to the proposed testimony of Halvor Robberstad, and we ask to have this marked as Government's Exhibit number 106.

(Document Marked Government's Exhibit 106 for Identification by the Reporter.)

91.

Mr. Lewis: 61. Respondents offer to prove by the witness Halvor Robberstad, duly sworn and on the stand ready to testify, that he is a resident of the village of Warroad, Roseau County, Minnesota. That for more than two years he has been U. S. Postmaster in said village of Roosevelt in said County, and that for a number of years he was the president of the village council of said village. That after transferring his residence from Roosevelt to Warroad he was for a number of years president of the village council of Warroad. That he has lived in said county of Roseau during the past twenty-five years.

92.

62. Respondents further offer to prove by said witness that during said entire period of twenty-five years he has been familiar with the fact that certain lands in the vicinity of Lake of the Woods were flooded and used for flowage and storage purposes in connection with the formation of a storage reservoir in said lake in the development of water power. That it is a matter of common report, reputation, and conversation among the people of said Roseau County generally

112 that said lands so flooded were very valuable on account of their use for flowage and storage purposes, and the said lands were more valuable for said purposes than for any other purpose.

Mr. Harries: 61-62. To all of which the Government objects as immaterial, inasmuch as value for storage could not as a matter of law be reflected in market values because of the impracticability of realizing the values alleged.

The Court: The objection is sustained.

Mr. Lewis: Exception.

93.

Mr. Lewis: 63. Respondents further offer to prove by said witness that in 1917 he purchased an eighty acre tract all of which is below contour 1064 on the shore of said lake. That said tract was completely flooded during the preceding year, 1916, and that considerable portions of the same were flooded at the time he purchased it in 1917. That he purchased said tract solely on account of its value and reputed value for flowage and storage purposes. That he paid a larger price for said land than he otherwise would have paid because of its availability and use for such flowage and storage purposes. That in fact he would not have purchased said land at all except for the fact that it was so available and was so used.

94.

64. Respondents further offer to prove by said witness that his grantor of said tract at the time of said sale and transfer was in financial distress and that said transfer was the result of a forced sale.

Mr. Harries: 63-64. The Government objects to the evidence in the two foregoing paragraphs on the ground that it is incompetent, without proper foundation, purports to describe a state of mind, is not the best evidence of a forced sale, is immaterial and irrelevant to the issue of damages because as a matter of law, of which witness was constructively aware, the value for storage purposes could not affect the market value of the land.

113 The Court: The objection is sustained.

Mr. Lewis: Exception.

95.

Mr. Lewis: 65. Respondents further offer to prove by said witness that for a number of years between 1919 and 1929 he served as a member of a committee of the Commercial Club of the Village of Warroad, which committee was charged with the responsibility of protecting the rights and

interests of the Village of Warroad in connection with the artificial raising of the waters of said Lake of the Woods.

Mr. Harries: 65. Objected to as immaterial.

The Government also objects to all of the proposed testimony of Halvor Robberstad and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 49.

(Document Marked as Respondents' Exhibit 49 for Identification by the Reporter.)

Mr. Lewis: Respondents next offer to prove by the witness John A. Kennedy the fact set forth in Respondents' Exhibit 49 and state to the Court that if Mr. Kennedy were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to the proposed testimony of John A. Kennedy on the grounds stated in the typewritten sheet attached to his proposed testimony and I ask to have this marked as Government's Exhibit 107.

(Document Marked Government's Exhibit 107 for Identification by the Reporter.)

96.

Mr. Lewis: 66. Respondents offer to prove by the witness John A. Kennedy, duly sworn and on the stand
114 ready to testify, that he is a resident of the village of Baudette in Lake of the Woods County, Minnesota. That for thirty years he has been deputy U. S. Collector of Internal Revenue at said village of Baudette. That he first became interested in the vicinity of Lake of the Woods in the year 1886 and that for a number of years thereafter he was engaged in the cruising and timber business in said region.

97.

67. Respondents further offer to prove by said witness that shortly after the placing of the stop logs in the Norman Dam in 1898 the low lands along the shores of said lake became flooded, and thereafter were used for flowage and stor-

age purposes in connection with the development of water power. That during the early years of said period of flooding of said land he did not own any real estate in the vicinity of said lake, but that he remembers distinctly that the fact of the flooding of said land was the subject of a great deal of public and private discussion during said years, and that it was a matter of common report, reputation, and conversation during said years following 1898, and that it was a matter of common report, reputation, and conversation during said years among the people residing in the vicinity of Lake of the Woods generally that said lands so flooded in connection with the development of water power were of higher value on that account and were more valuable for flowage and storage purposes than for any other use or purpose.

66-67. The Government objects to the testimony of John A. Kennedy on the ground that discussion, report and reputation of high values which as a matter of law could not be reflected at market values are immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

98.

Mr. Lewis: 68. Respondents further offer to prove by said witness that on or about the year 1910 he became a
115 member of the association of property owners known as the Low Water Association, and that from that time down to the present time he has been a member of the Association of said property owners. That said association employed counsel to represent it and to represent the rights and interests of the property owners whose lands were so flooded. That said association at all times were active in an effort to collect compensation and damages for the use of said lands so flooded in the formation of a storage reservoir in said lake and also in obtaining for the members of said association the fair value of said lands for flowage and storage purposes. That in that connection said association employed the services and obtained the advice of men skilled and experienced in the determination of the value of flowage easements and the value of the use of property so used for flowage and storage purposes.

Mr. Harries: 68. Objected to as immaterial.

The Government also objects to all of the proposed testimony of John A. Kennedy and to each item of evidence therein contained upon each of the grounds stated immediately af-

ter the offer to prove by means of the witness Adolph F. Meyer.

The Court: Objection sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit number 50.

(Document marked Respondents' Exhibit 50 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness George C. Newton the facts stated and set forth in Respondents' Exhibit 50 and state to the Court that if Mr. Newton were permitted to testify that he would testify to the facts as set forth in said exhibit, and in connection with Mr. Newton's testimony or offer to prove, I wish to state to the Court that there will be an additional offer to prove there in connection with Mr. Newton.

116

Mr. Harries: Subject to additional objections and further offers the Government objects to the testimony offered and to each item therein upon the grounds set forth in two typewritten sheets attached to the proposed testimony of George C. Newton and I ask to have this document marked as Government's Exhibit 108.

(Government's Exhibit 108 marked for identification by the reporter.)

The Court: The objection is sustained.

Mr. Lewis: Exception.

99.

Mr. Lewis: 69. Respondents offer to prove by the witness George C. Newton, duly sworn and on the stand ready to testify, that he is forty-five years of age. That he is a resident of Iron Mountain, Michigan, and has lived there for the past ten years. That he was graduated from the University of Wisconsin in 1907 in the mechanical engineering course, and later took advanced work at said university in mechanical engineering, obtaining the advanced degree of mechanical engineer in 1921. That he is a member of the following engineering societies: American Society of Civil Engineers, being a charter member of the Duluth section of said society; American Institute of Mining and Metallurgical Engineers, Lake Superior Mining Institute. That he is a director of the Pigeon River Lumber Company, owning and operating a num-

ber of dams on the Pigeon River, being boundary waters between the State of Minnesota and the Province of Ontario, Canada. That he has had twenty-five years general engineering experience along various lines. That during the past seventeen years he has had special experience in the investigation and construction of water power, flowage and
117 reservoir projects, and in the appraisement, purchase, and sale of flowage easements and other properties connected with such projects. That during said period he has personally engaged in or been connected with the appraisement, purchase, or sale of upwards of twenty-five flowage or storage reservoirs, among which are the Cloquet River Reservoirs of the Minnesota Power and Light Company in St. Louis County, Minnesota, the Minnesota Power and Light Company's project at Kaweshiwi Falls, on Falls Lake, near Winton, Minnesota, the Menominee River developments on the border between Michigan and Wisconsin, the Dead River and Hoist Dam Reservoirs of the Cliffs Power Company in Michigan, the Paint River Reservoir in Michigan, the Flambeau Reservoir of the Chippewa and Flambeau River in Wisconsin, the North Fowl and South Fowl and Royal Lakes Reservoir on the Pigeon River on the international border between Minnesota and Canada, the Arrow Lake Reservoir at the headwaters of Arrow River, a tributary of the Pigeon River. That during the past eleven years he has been engaged as a consulting engineer, specializing in hydro-electric and mining projects. That during said period he has served as consulting engineer for the following companies, among others: Pickands-Mather Company of Cleveland, Ohio; Heineman Land & Power Company of Wausau, Wisconsin, B. C. Neely, of Crystal Falls, Michigan, Stevenson Estate of Milwaukee, Wisconsin, and Pigeon River Timber Company and other concerns interested in the development of power on the Pigeon River and tributaries.

100.

70. Respondents further offer to prove by said witness that he is personally acquainted with the promotion and development of a number of hydroelectric projects in international boundary waters between the United States and the Dominion of Canada, among which are the St. John River
118 Power Company project in the St. John River, being boundary waters between the State of Maine and the Province of New Brunswick, and the projects of the Pigeon River Lumber Company in the Pigeon River, being a part of the International boundary waters between the State

of Minnesota and the Province of Ontario. That he is acquainted with the facts pertaining to the physical and international questions and aspects involved in said developments in international waters.

101.

71. Respondents further offer to prove by said witness that he is well acquainted with the Lake of the Woods. That during the past two years he has owned and operated on said lake a cabin power boat for pleasure purposes, and has made numerous cruises in said boat throughout said lake and has become thoroughly familiar therewith and with the storage reservoir thereof. That he has made a thorough examination and study of the drainage area of said lake and reservoir and of all physical facts, features, and questions affecting or involved in the development and use of said reservoir. That he has studied and become familiar with the document known as Water Resources Statement No. 3 of the Dominion Water Power Branch, Department of the Interior of Canada, published in 1915; entitled, "Winnipeg River Power & Storage Investigation," by J. T. Johnston, also the document known as Water Power Resource Papers of the Department of the Interior of Canada, Dominion Water Power and Reclamation Surveys, Nos. 31, 54 and 57, as well as considerable other literature and engineering and statistical data and information relating to the power resources and developments of the Lake of the Woods and the Winnipeg River. That he has visited and inspected the power projects at the outlets of the Lake of the Woods and in the Winnipeg River, and that he knows the power capacities of said lake and river and the extent of the development thereof up to the present time. That he
119 has visited the city of Winnipeg and the Villages of Kenora and Rainy River, and intervening points in Canada, and the Villages of Warroad, Baudette, and intervening points in the State of Minnesota, as well as many other points around the shores of Lake of the Woods in Minnesota and Canada. That he is familiar with the character of the lands involved in these condemnation proceedings.

Mr. Harries: 71. The Government objects to the use of Water Resources Papers and other underscribed documents as hearsay, not affording opportunity for examination, and as untested as to accuracy.

The Court: The objection is sustained.

Mr. Lewis: Exception.

102.

Mr. Lewis: 72. Respondents further offer to prove by said witness that he has heard or has read the official reporter's transcript of all the testimony given by Adolph F. Meyer in this proceeding relating to the facts and conditions of the Lake of the Woods, of the watershed of said lake, of the storage reservoir of said lake, of the Winnipeg River, of the power developments and other works in said lake and river, of the control that has been exercised and the use that has been made of the waters of said lake and river and particularly of the storage reservoir of said lake by means of said power developments and other works; also the testimony of said Adolph F. Meyer as to the facts and conditions of the resources and capacities of all of said waters for power and other purposes.

103.

Mr. Lewis: 73. Respondents further offer to prove by said witness that he is familiar with the rules, regulations and practice of the International Joint Commission, the Federal Power Commission of the United States, and the Department of Lakes, Forests, and Mines of the Province of Ontario, Canada, with reference to the development and establishment of storage reservoirs, power projects and other projects
120 in international boundary waters. That he has prepared applications for such projects for presentation of said International Joint Commission and for other authorities.

104.

Mr. Lewis: 74. Respondents further offer to prove by said witness that the physical and international aspects of the development and use of the Lake of the Woods reservoir are similar in character to the physical and international aspects of said St. John's River Power Company development, which has been carried out by private enterprise under authorization of said International Joint Commission, and which involves the construction of a dam entirely within the Province of New Brunswick, Canada, overflowing lands both in said province and in the State of Maine.

Mr. Harries: 74. The Government objects to this testimony on the ground that the testimony relative to the St. John's River is not sufficiently specific to afford a basis or qualification for comparison with the Lake of the Woods.

105.

Mr. Lewis: 75. Respondents further offer to prove by said witness that he knows of no reason why the flowage easements required for the Lake of the Woods reservoir could not be utilized and the storage capacity of said reservoir developed by private enterprise without governmental aid or cooperation other than such authorization as the Governments of the United States and Canada have extended and granted as a matter of common practice pursuant to the rules and regulations of the International Joint Commission and other authorities which have been mentioned. That he is of the opinion that said flowage easements and storage capacity could have been so utilized and developed by private enterprise.

Mr. Harries: 75. While the Government admits that the witness has no knowledge of the obstacles to utilization
121 of the storage capacity of the lake, the Government objects to evidence that this witness "knows of no reason why flowage easements required for the Lake of the Woods reservoir could not be utilized and the storage capacity of said reservoir developed by private enterprise" upon the ground that this lack of knowledge by the witness has no tendency to prove the practicability of such utilization and development; or that it enhanced market values of the shore lands; and further objects to the testimony as stating a conclusion for which no proper foundation has been laid.

The Court: The objection is sustained.

Mr. Lewis: Exception.

106.

Mr. Lewis: 76. Respondents further offer to prove by said witness that he has had extensive experience during the past seven years in buying and selling flowage rights and easements on his own account or on account of the companies in which he was interested or on account of clients whom he represented. That during said period he has been engaged in or directly connected with the appraisement, buying and selling of flowage easements and storage rights totalling in value and price in the neighborhood of ten million dollars. That during said period he has had extensive experience in connection with the sale, purchase and acquisition of flowage rights and easements without the intervention of the exercise of the right of eminent domain, and that in the greater part of such transactions with which he has been connected the right of eminent domain was not exercised. That the State

of Michigan, where he has had extensive experience in connection with such transactions, the right of eminent domain was not available to corporations or companies for the purpose of developing storage reservoirs or water power for a period of sixty years or more prior to the year 1928. That he knows of his own knowledge that there have been no
122 condemnations of flowage rights or easements in the State of Michigan by such corporations or companies for the past sixty years or more up to the present time, but that nevertheless during said period many large and important storage reservoirs have been created and developed by such corporations and companies in said state, involving the acquisition in connection with various single projects of many hundreds of separate easements belonging to separate and distinct property owners.

Mr. Harries: 76. The Government objects to this evidence upon the ground that it is irrelevant and immaterial and has no bearing upon the valuation of lands in the State of Minnesota bordering on international waters; and further objects to the testimony as stating conclusions of law.

The Court: The objection is sustained.

Mr. Lewis: Exception.

107.

Mr. Lewis: 77. Respondents further offer to prove by said witness that it is his opinion that it would have been entirely practicable and feasible to acquire the flowage rights and easements necessary to the formation of a storage reservoir such as has been formed in the Lake of the Woods up to contour 1064 by private enterprise and without invoking or resorting to the exercise of the right of eminent domain.

Mr. Harries: 77. The Government objects to this testimony upon the ground that it states a legal conclusion; that no foundation has been laid by stating the elements to be taken into account; and upon the ground that the evidence shows as a matter of law that it would not have been practicable or feasible for private enterprise to attempt to form a reservoir; and upon the ground that the opinion of the witness is immaterial inasmuch as the practical possibility of completing the enterprise was as a matter of law too remote to affect market values.

123 The Court: The objection is sustained.

Mr. Lewis: Exception.

108.

Mr. Lewis: 78. Respondents further offer to prove by said witness that there is no market value for flowage easements or for flowage or storage rights in the State of Minnesota and other northwestern states, within the usually accepted meaning of the term "market value". That the value of flowage easements and storage rights for storage reservoirs is determined as a matter of custom and practice by reference to the special facts and circumstances involved in each instance. That there is a certain custom and practice recognized and followed by hydraulic engineers and by appraisers, owners, and uses of flowage easements and storage rights, whereby the value of such easements and rights is determined. That he knows what said certain custom and practice is.

Mr. Harries: 78. The Government objects to the evidence in the first sentence of the foregoing paragraph upon the ground that it constitutes a conclusion of law; that no foundation has been laid for this testimony; that custom and practice cannot overcome a settled principle of law that damages in condemnation proceedings are to be measured by the difference in market value of the property affected by the condemnation.

The Court: The objection is sustained.

Mr. Lewis: Exception.

109.

Mr. Lewis: 79. Respondents further offer to prove by said witness that according to said custom and practice the value of flowage easements and storage rights for storage reservoirs is arrived at by the exercise of judgment by persons skilled and experienced therein, based upon engineering experience, taking into consideration the availability for use of such easements and storage rights, the relative proximity in point of time of such use, and the economic value
124 of such use.

Mr. Harries: 79. The Government objects to this evidence upon the ground that engineering experience is not a prerequisite to the determination of market value; that the economic value of a "use" is not the measure of damage in these condemnation proceedings; and that the foregoing testimony is immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

110.

Mr. Lewis: 80. Respondents further offer to prove by said witness that the value of flowage easements and storage rights may be appraised with much greater certainty where the reservoir of which such easements form a part has been actually formed and is in existence, and where the use thereof has actually been determined.

Mr. Harries: 80. To which the Government objects on the ground that the testimony is immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

111.

Mr. Lewis: 81. Respondents further offer to prove by said witness that he has made a thorough examination, inspection, and study extending over a period of three years of the Lake of the Woods and its principal drainage area of the dams, power plants and other works at the outlets of said lake and in the Winnipeg River, of the possible sites and power developments at said outlets and in said river, of the flow of waters into and out of said lake, of the storage reservoir formed in said lake, and of the operation and use of said storage reservoir. That through said exam-
125 ination, inspection, and study he has become familiar with and knows the uses of said storage reservoir which are immediately available and the possible uses to which the same may be put.

112.

Mr. Lewis: 82. Respondents further offer to prove by said witness that he has made an examination and appraisal of the lands upon which it is necessary to acquire a flowage easement up to contour 1064 for said storage reservoir and that he knows the fair value thereof. That he has made an examination and appraisal of the flowage easement sought to be acquired in these proceedings on the lands of Elias Olson, Harry Brewster, and Randor G. Karlson, up to contour 1064, as described in the petition herein, and that he knows what is the fair value of each of said easements, or what is sometimes referred to as the fair market value of said easements, considering that there is no actual general market for such easements, as the term "market" is commonly used.

113.

Mr. Lewis: 83. Respondents further offer to prove by said witness that the fair value of said flowage easements,

sometimes referred to as the fair market value, as previously stated, is as follows:

On the lands of Elias Olson, $11,200.

On the lands of Harry Brewster, $18,000.

On the lands of Randor G. Karlson, $12,200.

Mr. Harries: 83. The Government objects to the foregoing testimony upon the ground that no sufficient foundation has been laid, but that on the contrary the witness, in stating that there is no general market for the property he values, clearly shows that he is incompetent to testify as to market values, which alone constitute the measure of damages in this case. The Government further objects to the testimony of values by this witness upon the ground
125a that adaptability for flowage purposes could not, as a matter of law, have affected market values because of the practical impossibility of carrying out the project without the intervention of eminent domain and the formation of international agreements.

126 "The Government also objects to all of the proposed testimony of Gardner S. Williams and George C. Newton, and to each item thereof, upon each of the grounds stated immediately after the offer to prove previously made by means of the witnesses Gardner S. Williams and George C. Newton, and Adolph F. Meyer.

The Court: The objections will be sustained.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit Number 51.

(Document marked Respondents' Exhibit 51 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness H. C. Habstritt the facts set forth in Respondents' Exhibit 51 and state to the Court that if Mr. Habstritt were permitted to testify he would testify to the facts set forth in said exhibit.

Mr. Harries: The Government objects to the admission of the evidence of the proposed testimony upon the grounds set forth in the typewritten sheets attached to the copy of the Exhibit just offered by the respondents, and I ask to have them marked as Government's Exhibit 109.

(Document marked Government's Exhibit 109 for identification by the reporter.)

114.

Mr. Lewis: 84. Respondents offer to prove by the witness Habstritt, duly sworn and on the stand ready to testify, that from 1905 to 1910 he was a resident of the Village of Baudette in Lake of the Woods County, Minnesota. That since 1910 he has been a resident of Roseau in the County of Roseau, Minnesota. That for the past fifteen years he has been engaged in the real estate business. That he is thoroughly acquainted with the transfers of real property made in Roseau County during said time.

115.

Mr. Lewis: 85. Respondents further offer to prove by said witness that he has never known or heard of a sale or transfer of a flowage easement on any of the lands in
127 Lake of the Woods or Roseau County.

Mr. Harries: 85. Objected to as immaterial; damage in condemnation proceedings are determined by taking the difference in value of the entire tract affected by an easement before and after the taking; and the absence of conveyance of easements as such, does not disprove a market on which damages in condemnation shall be based; besides, the record conclusively shows by certified copies of recorded instruments of conveyance of flowage rights, that transfers did, in fact, occur.

The Court: The objection is sustained.

Mr. Lewis: Exception.

116.

Mr. Lewis: 86. Respondents further offer to prove by said witness that he personally knows of and had personal connection with the sale and transfer of a number of tracts of land in Roseau County wherein the purchase was made solely because of the value and reputed value of the land in question for flowage and storage purposes on Lake of the Woods and wherein the seller of said land sold same because he was in financial distress and was forced so to do.

Mr. Harries: 86. To which the Government objects on the ground that the evidence is immaterial; that the witness has not shown himself competent to testify as to motive save by hearsay; and that the allegation that the sale was forced is not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

117.

Mr. Lewis: 87. Respondents further offer to prove by said witness that ever since 1905 it has been a matter of common report, reputation and conversation among the people generally residing in Lake of the Woods and Roseau Counties that the lands in the vicinity of the Lake of the Woods which were being flooded by the storage of
128 water in the Lake of the Woods was of high value for flowage and storage purposes, and that it was a matter of common report, reputation, and conversation among said people that said lands so flooded were more valuable for flowage and storage purposes than for any other use or purpose.

Mr. Harries: 87. The Government objects to the foregoing testimony of a higher "use value" on the ground that it is immaterial since as a matter of law the possibility of use for flowage could not be reflected in market values because of the impossibility of making such use of the lands by any means other than the means now invoked, i. e. by international treaty and eminent domain.

The Government also objects to all of the proposed testimony of H. C. Habstritt and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Harries: May the record also show, Your Honor, that the Government objects to the offers to prove on the part of the respondents, as to each item thereof, upon the grounds that were stated at length to the Court at the opening of court on Tuesday morning, January 27th last.

The Court: Yes, the record may so show.

Mr. Harries: And, if the Court please, counsel for Canada has asked me to request leave of the Court to file, as a part of the objections to the receipt of this testimony, the brief which was handed to the Court at the time the question of reservoir values was first raised, and he asks that that appear in the record, probably at this point.

The Court: Well, the record may so show, then—he wants the record to show that objections were made
129 for the admission of this evidence, for the reasons stated in his brief?

Mr. Harries: Yes, Your Honor.

Mr. Lewis: And may the record show, Your Honor, that in each of these offers to prove, which respondents have made, that each fact recited in the typewritten form, or the offer to prove, which is reduced for convenience to typewriting,—that each fact is offered separately in connection with each one of the offers.

The Court: Yes, that will be the understanding.

The Court: Now, it is my understanding that the Government makes no point of the fact that each one of these witnesses was not called to the stand and sworn before the offer of proof was made?

Mr. Harries: No, your Honor.

130 118.

"Respondents' Offer to Prove

Gardner S. Williams and George C. Newton.

Mr. Lewis: Respondents offer to prove by the witness Gardner S. Williams and George C. Newton, that flowage rights and easements are the subject of purchase and conveyance in the State of Minnesota as separate and distinct units of property, and that such rights and easements not infrequently are rented as well as sold. That such flowage rights and easements have a recognized rental value, and that said rental is determined and arrived at in a manner similar to the process of negotiation whereby the fair value, or as sometimes stated the fair market value, of such flowage rights and easements is determined, as described in the foregoing offers to prove by said witnesses.

Mr. Harries: The Government objects to this testimony on the ground that it constitutes a conclusion of law; and is immaterial inasmuch as rental values are not the measure of damage in a condemnation proceeding; and as a matter of law could not have been reflected in the market value of the property affected by the easement.

119.

Mr. Lewis: Respondents further offer to prove that said method of arriving at the fair rental value of such flowage

rights and easements is the standard custom and practice usually and customarily followed and employed by persons who engage in the rental of said flowage easements. That said witnesses have had experience in the determination of such fair rental value, and are acquainted with the custom and practice by which said fair rental value is customarily agreed upon and determined.

Mr. Harries: The Government objects to this testimony on the ground that custom and practice in determining rental values of easements are not material and do not go to the measure of damage in this proceeding.

131 120.

Mr. Lewis: Respondents further offer to prove that what is the fair rental value of any given flowage right or easement must be determined by a consideration of all the factors and conditions affecting each particular tract or case, and that such consideration and the determination of what is the fair rental value based thereon, is a matter of expert opinion arrived at by the exercise of engineering and market and business experience.

Mr. Harries: Objected to as a conclusion of law and as immaterial.

121.

Mr. Lewis: Respondents further offer to prove by said witnesses Williams and Newton, that they are acquainted with the lands involved in these proceedings, and with the circumstances and facts which should be taken into consideration in determining the fair rental value of the flowage easement sought to be imposed on said lands.

Mr. Harries: Objected to as a conclusion of law.

122.

Mr. Lewis: That they have given careful study to all said facts and conditions, and that they have formed an opinion based upon their knowledge and experience as to what is the fair rental value of each of said easements.

123.

Mr. Lewis: Respondents further offer to prove by said witness Gardner S. Williams, that the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Elias A. Olson, described in the petition for said easement is $864.00.

Mr. Harries: To this evidence the Government objects on the ground that it is immaterial and not a proper measure of damage in this proceeding; and upon the further ground that rental value was not, and as a matter of law could not be reflected in the market value of the tracts affected by the imposition of the easement because the union of properties necessary was not so practicable that the possibility would affect the market price and such union would not have been practicable or have been attempted except by the intervention of eminent domain.

132

124.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Harry Brewster, described in the petition for said easement is $1064.00.

Mr. Harries: To which the Government objects on the same ground as last above noted.

125.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Randor G. Karlson, described in the petition for said easement is $752.00.

126.

Mr. Lewis: Respondents offer to prove by said witness George C. Newton, that the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Elias A. Olson, described in the petition for said easement is $896.00.

Mr. Harries: To which the government objects on the same ground as stated to the offer contained in paragraph 93.

127.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Harry Brewster, described in the petition for said easement is $1440.00.

Mr. Harries: Same objections as interposed to the offer in paragraph 93.

128.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the

lands of Randor G. Karlson; described in the petition for said easement is $976.00.

Mr. Harries: Same objections as interposed to the offer of proof made in paragraph 93.

133 The Government also objects to all of the proposed testimony of Gardner S. Williams and George C. Newton, and to each item thereof, upon each of the grounds stated immediately after the offer to prove previously made by means of the witnesses Gardner S. Williams and George C. Newton, and Adolph F. Meyer.

The Court: The objections will be sustained.

Mr. Lewis: Exception.

129.

That the court erred in refusing to give respondents' request for instructions to the jury numbered 1, as follows:

"The jury is instructed to return a verdict in favor of each respondent for the fair value of the flowage easement which petitioner is seeking to acquire on each of said respondents' land, as disclosed by the evidence.

"If the Court shall deny respondents' first request for instructions, then respondents respectfully request the Court to give the following instructions to the jury:"

130.

That the court erred in refusing to give respondents' request for instructions to the jury numbered 2, as follows:

"In computing the amount of compensation to which each respondent is entitled, you should award him such an amount as will justly compensate him for his property taken by petitioner in these condemnation proceedings. You should take into consideration all of the uses for which respondents' said property is suitable and to which you find from the evidence that his said property was adapted on May 4th, 1929, and determine which of said uses is the most valuable and base your award thereon."

131.

That the court erred in refusing to give respondents' request for instructions to the jury numbered 3, as follows:

"You are instructed that each respondent is entitled to your verdict for such an amount as will justly represent the fair value of his property for the most valuable use to
134 which it was plainly adaptable and available on May 4th, 1929."

132.

That the court erred in refusing to give respondents' request for instructions to the jury numbered 4, as follows:

"You are instructed that you should award each respondent such an amount as will justly compensate him for the fair value for flowage and storage purposes of so much of his property as petitioner seeks to acquire by these proceedings, provided you find that his property was suitable for flowage purposes and that such was its most valuable use."

133.

That the court erred in instructing the jury in the following language as set forth in the last paragraph on page 734 and ending on the top of page 735 of the reporter's transcript:

"The first question for you to determine with reference to each piece of property involved in this proceeding is this: what was the fair market value of this property under natural conditions on May 4, 1929, at the time the easement was imposed, taking into consideration the right of the Government to maintain the levels of the lake up to level 1059. The next question is, what was the fair market value of this same property on May 5th, with the easement imposed upon it. By deducting the value of the property after the easement was imposed, from its value before the easement was imposed, you reach the amount of damage, the amount which the Government ought to pay."

134.

That the court erred in instructing the jury in the following language as set forth on page 735 of the reporter's transcript:

"In computing the fair market value, both before and after the imposition of the easement, you will take
135 into consideration all of the uses for which the property was available on May 4, 1929, and May 5th, 1929, and determine what use it was most valuable for, and base your award thereon; but you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes re-

lating to agriculture, so that it is for those purposes that you are to value these lands."

135.

That the court erred in instructing the jury in the following language as set forth on pages 736 and 737 of the reporter's transcript:

"As you understand, at the outset of this case perhaps the most controverted question was the question as to whether in determining the value of these lands, any added value could be accredited them because of the fact that they formed the boundaries or shores of what would be a very large reservoir, which would be used in part for the benefit of power companies on the Winnipeg River. I have held that as a matter of law, that question does not come into this case under all of the circumstances, so that you have absolutely nothing to do with it, and will not consider it in any way in your deliberations. * * * Consider this question as involving nothing except these particular lands, and ask yourselves what under the evidence was the fair value, the fair market value of each piece of property on May 4th, without the easement upon it, and taking into consideration the right of the Government to use the ordinary natural lake
136 bed up to level 1059 for flowage purposes, Then ask yourselves what the fair market value of these different tracts was after the imposition of the easement."

136.

The court erred in instructing the jury in the following language as set forth on page 738 of the reporter's transcript:

"but after all, what we are asking you for, is your best judgment as to what, under the law and the evidence, constitutes the damage done to these lands by the taking of the easement in question."

137.

That the court erred in instructing the jury in the following language as set forth on page 747 of the reporter's record:

"As I told you in my charge, the questions you are to decide are the questions of damages to the lands involved in this case, and those were to be determined by determining the fair market value of each tract, assuming the lake to be in its natural state on the 4th day of May, 1929, taking into consideration the right of the Government to maintain the lake

at a level of 1059 for navigation purposes, and then what the value of the same tract was on the 5th day of May, 1929, with the easement imposed. That is, you are to determine the fair market value of each tract, under natural conditions, on May 4th, without the easement, and to subtract the latter value from the former value, and in that way arrive at your damages.".

138.

That the court erred in ordering and entering judgment in favor of petitioner and against respondent-appellant Randor G. Karlson, that upon payment of the sum of $880.00, the United States of America as against respondent-appellant Randor G. Karlson and all persons interested in said lands shall become permanently vested with all the rights prayed for in its petition herein, as against said lands described in said petition.

137

139.

That the court erred in ordering and entering judgment in favor of petitioner and against respondent-appellant Harry Brewster, that upon payment of the sum of $900.00, the United States of America as against respondent-appellant Harry Brewster and all persons interested in said lands shall become permanently vested with all the rights prayed for in its petition herein, as against said lands described in said petition.

140.

That the court erred in ordering and entering judgment in favor of petitioner and against respondent-appellant Elias A. Olson, that upon payment of the sum of $490.00, the United States of America as against respondent-appellant Elias A. Olson and all persons interested in said lands shall become permanently vested with all the rights prayed for in its petition herein, as against said lands described in said petition.

141.

That the court erred in ordering and entering judgment in favor of said petitioner and against respondent-appellant Randor G. Karlson that upon payment of said sum of $880.00, the United States of America shall become permanently vested with the right to raise the water level in the Lake of the Woods to a maximum height of 1064 sea level datum, and to flood or otherwise affect said lands in such manner and to such extent as may be incidental to the raising of the level of the waters in said lake, as aforesaid.

142.

That the court erred in ordering and entering judgment in favor of said petitioner and against respondent-appellant Harry Brewster, that upon payment of said sum of $900.00, the United States of America shall become permanently vested with the right to raise the water level in the Lake of the Woods to a maximum height of 1064 sea level datum, and to flood or otherwise affect said lands in such manner and to such extent as may be incidental to the raising
138 of the level of the waters in said lake, as aforesaid.

143.

That the court erred in ordering and entering judgment in favor of said petitioner and against respondent-appellant, Elias A. Olson, that upon payment of said sum of $490.00, the United States of America shall become permanently vested with the right to raise the water level in the Lake of the Woods to a maximum height of 1064 sea level datum, and to flood or otherwise affect said lands in such manner and to such extent as may be incidental to the raising of the level of the waters in said lake, as aforesaid.

144.

That said judgments, and each of them, are against the manifest weight of the evidence.

145.

That said judgments, and each of them, are contrary to law.

That all of the errors herein mentioned were duly excepted to by respondents-appellants.

Wherefore, your said respondents-appellants pray that the decree and judgments of the District Court of the United States for the District of Minnesota, Sixth Division, entered and filed in said proceedings on February 13, 1931, may be reversed and vacated, and that respondents-appellants be granted a new trial of their said cause.

C. E. BERKMAN,
Chisholm, Minnesota.

JOHN H. HOUGEN,
Crookston, Minnesota.

LEWIS, HUNT & PALMER,
By I. K. Lewis,
Duluth, Minnesota.
Attorneys for Respondents-Appellants.

(Endorsed): Amended Assignment of Errors. Filed in U. S. Circuit Court of Appeals on June 30, 1931, E. E. Koch, Clerk.

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140 (Order of U. S. Circuit Court of Appeals Granting Leave to Elias A. Olson to Attach Appendix to Brief, etc.)

It having been made to appear to the Court that the evidence received and excluded, and the offers to prove which were excluded by the trial court on the trial of the above entitled action, and which are urged by respondents as error on said appeal, are very voluminous, and that said evidence and offers to prove, together with the court's rulings thereon are set forth and quoted verbatim both in the amended assignments of error and in the bill of exceptions in said appeal, and appellants, in the interest of convenience and economy, having made application to this court for leave to file as an appendix to their brief a printed quotation of such evidence, with the rulings of the court thereon, in lieu of including the same in the body of their brief, as required by Rule #24 of this court,

Now, Therefore, It Is Ordered, That if respondents shall file with the Clerk of this Court with their brief and as an appendix thereto twenty (20) copies of a paged
141 printed statement quoting such evidence and offers to prove, and the rulings of the court thereon as are urged by respondents on said appeal, and if respondents, whenever any one of the matters contained in such appendix is referred to in their brief, shall cite the page of such appendix and the page of the printed record where such matter is found, said filing of such appendix shall be regarded by the court as compliance with the fourth paragraph of said Rule #24 of this Court.

Dated at Minneapolis, Minnesota, this 3rd day of August, 1931.

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411 And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant in Cause No. 9279.)

United States Circuit Court of Appeals
Eighth Circuit.

Elias A. Olson, Appellant,
No. 9279. vs.
United States of America.

The Clerk will enter my appearance as Counsel for the Appellant.

I. K. LEWIS,
Duluth, Minn.

JOHN H. HOUGEN,
Crookston, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1933.

(Appearance of Counsel for Appellee in Cause No. 9279.)

The Clerk will enter my appearance as Counsel for the Appellee.

LEWIS L. DRILL,
U. S. Atty. Dist. of Minn. Post Office Bldg., St. Paul, Minn.

DONALD D. HARRIES,
Sp. Asst. U. S. Attorney, 1200 Alworth Bldg., Duluth, Minn.

D. N. LINDEMAN, Esq.,
U. S. Engineer Office, Canal Park, Duluth, Minn.

412 (Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 24, 1931.

(Appearance of Counsel for State of Minnesota in Cause No. 9279.)

The Clerk will enter my appearance as Counsel for the State of Minnesota.

HENRY N. BENSON,
CHESTER S. WILSON,
State Capitol, St. Paul, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

(Appearance of Counsel for the Government of Canada in Cause No. 9279.)

The Clerk will enter my appearance as Counsel for the Government of Canada (appearing pursuant to the provisions of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods; signed at Washington the 24th day of February, 1925).

JOHN E. READ.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

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413 (Appearance of Counsel for Appellant in Cause No. 9280.)

United States Circuit Court of Appeals
Eighth Circuit.

Randor G. Karlson, Appellant,
No. 9280. vs.
United States of America.

The Clerk will enter my appearance as Counsel for the Appellant.

I. K. LEWIS,
Duluth, Minn.

JOHN H. HOUGEN,
Crookston, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1931.

(Appearance of Counsel for Appellee in Cause No. 9280.)

The Clerk will enter my appearance as Counsel for the Appellee.

LEWIS L. DRILL,
U. S. Atty. Dist. of Minn., Post Office Building, St. Paul, Minnesota.

DONALD D. HARRIES,
Special Assistant U. S. Atty. 1200 Alworth Bldg., Duluth, Minnesota.

D. N. LINDEMAN, Esq.,
U. S. Engineer Office, Canal Park, Duluth, Minnesota.

414 (Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 24, 1931.

(Appearance of Counsel for State of Minnesota in Cause No. 9280.)

The Clerk will enter my appearance as Counsel for the State of Minnesota.

HENRY N. BENSON,
CHESTER S. WILSON,
State Capitol, St. Paul, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

(Appearance of Counsel for the Government of Canada in Cause No. 9280.)

The Clerk will enter my appearance as Counsel for the Government of Canada (appearing pursuant to the provisions of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods; signed at Washington the 24th of February, 1925).

JOHN E. READ.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

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415 (Appearance of Counsel for Appellant in Cause No. 9281.)

United States Circuit Court of Appeals
Eighth Circuit

Harry Brewster, Appellant,
No. 9281. vs.
United States of America.

The Clerk will enter my appearance as Counsel for the Appellant.

I. K. LEWIS,
Duluth, Minn.

JOHN H. HOUGEN,
Crookston, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1931.

(Appearance of Counsel for Appellee in Cause No. 9281.)

The Clerk will enter my appearance as Counsel for the Appellee.

LEWIS L. DRILL,
U. S. Dist. Atty., Dist. of Minn., Post Office Bldg., St. Paul, Minnesota.

DONALD D. HARRIES,
Special Asst. U. S. Atty., 1200 Alworth Bldg., Duluth, Minnesota.

D. N. LINDEMAN, Esq.,
U. S. Engineer Office, Canal Park, Duluth, Minnesota.

416 (Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 24, 1931.

(Appearance of Counsel for State of Minnesota in Cause No. 9281.)

The Clerk will enter my appearance as Counsel for the State of Minnesota.

HENRY N. BENSON,
CHESTER S. WILSON,
State Capitol, St. Paul, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

(Appearance of Counsel for the Government of Canada in Cause No. 9281.)

The Clerk will enter my appearance as Counsel for the Government of Canada (appearing pursuant to the provisions of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods; signed at Washington the 24th of February, 1925.)

JOHN E. READ.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

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417 (Order of Argument in Causes No. 9279, 9280 and 9281.)

United States Circuit Court of Appeals
Eighth Circuit.

November Term, 1931.

Monday, December 7, 1931.

Elias A. Olson, Appellant,
No. 9279. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

Randor G. Karlson, Appellant,
No. 9280. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

and

Harry Brewster, Appellant,
No. 9281. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

These causes, Nos. 9279, 9280 and 9281, having been called for hearing in their regular order, upon application the Court granted one hour additional time for the oral argument. Argument was commenced by Mr. I. K. Lewis for the appellants, continued, by leave of Court, by Mr. Henry N. Benson and Mr. Chester S. Wilson in behalf of the State of Minnesota, by Mr. Donald D. Harries, Special Assistant United States Attorney, for the appellee, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

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418 (Order of Submission.)

November Term, 1931.

Tuesday, December 8, 1931.

These causes, Nos. 9279, 9280 and 9281, having been called for further hearing, argument was resumed by Mr.

Donald D. Harries, Special Assistant United States Attorney, for the appellee, continued by Mr. John E. Read, K. C., in behalf of the Government of Canada, by leave of Court first granted, and concluded by Mr. I. K. Lewis for the appellants.

Thereupon, these causes were submitted to the Court on the transcript of the record from said District Court, the brief of appellants in which counsel for the State of Minnesota have joined, the brief of appellee and the brief filed by leave in behalf of the Government of Canada.

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419 (Opinion in Causes 9279, 9280 and 9281.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 9279.—MAY TERM, A. D. 1933.

Elias A. Olson,	Appellant,	Appeal from the District Court of the United States for the District of Minnesota.
vs.		
United States of America,	Appellee.	

No. 9280.—MAY TERM, A. D. 1933.

Randor G. Karlson,	Appellant,	Appeal from the District Court of the United States for the District of Minnesota.
vs.		
United States of America,	Appellee.	

No. 9281.—MAY TERM, A. D. 1933.

Harry Brewster,	Appellant,	Appeal from the District Court of the United States for the District of Minnesota.
vs.		
United States of America,	Appellee.	

Mr. I. K. Lewis (Mr. John H. Hougen, Mr. C. E. Berkman and Messrs. Lewis, Hunt & Palmer were with him on the brief), for appellants.

Mr. Henry N. Benson and Mr. Chester S. Wilson, for State of Minnesota.

Mr. Donald D. Harries, Special Assistant United States Attorney (Mr. Lewis L. Dull, United States Attorney, District of Minnesota, and Mr. D. N. Lindeman, Attorney for United States War Department, were with him on the brief); for appellee.

Mr. John E. Read, K. C. for the Government of Canada.

Before STONE and BOOTH, Circuit Judges, and WYMAN, District Judge.

STONE, Circuit Judge, delivered the opinion of the court.

These are three separate appeals by landowners from judgments awarding damages in a condemnation proceeding prosecuted by the United States against the lands of each.

These lands border the Lake of the Woods which is a large body of water partly in the State of Minnesota and partly in Canada. The surface area of the lake is approximately 1,500 square miles with its outlet, by the Winnipeg River, in Canada. There are natural water power sites along that river. In order to utilize and develop these power possibilities, it is necessary to regulate the outflow of the water from the lake so as to maintain a dependable, uniform rate of flow during all seasons. This regulation of outflow must be secured by dams by which the flow can be controlled. The effect of such a dam is to restrain the outflow, to use the lake as a sort of reservoir and to raise the natural level of the lake. A raised level overflows shore lands. The lands involved here are shore lands so affected and it is this character of damage or taking which is in question.

In 1898, the Keewatin Power Company (a Canadian corporation) constructed, for power purposes, such a control dam in Canada, near Kenora. It utilized the lake as a reservoir and caused an average rise in the lake level of about three feet with resulting invasion of the shore lands. This flooding of shore lands has intermittently continued since 1898 and is substantially the level to be maintained hereafter. No damages were paid for this overflowing of lands.

In 1909, a treaty was made between the United States and Great Britain "relating to boundary waters" (Jan. 11, 1909, 36 Stat. part 2, p. 2448). This treaty established an International Joint Commission which, within defined limits, was given jurisdiction over "all cases involving the use or obstruction or diversion of the waters" (Art. VIII of Treaty) covered by Articles III and IV of the Treaty and respecting which those two Articles required the approval of the Commission. This jurisdiction expressly included uses for power * * purposes" (Art. VIII). This Treaty was general and did not specifically mention the Lake of the Woods.

The Commission was organized and the Lake of the Woods situation was referred to it. The final report (May 18, 1917) of the Commission was submitted to the two Governments and resulted in the "Treaty and Protocol * * * to regulate the level of the Lake of the Woods" (July 17, 1925, 44 Stat. part 3, p. 2108). This Treaty provided that "the level of Lake of the Woods shall ordinarily be maintained between elevations 1056 and 1061.25 sea level datum, and between these two elevations the regulations shall be such as to ensure the highest continuous uniform discharge of water from the lake" (Art. IV). There were other provisions applying to exceptional water conditions. An International Lake of the Woods Control Board was established to secure maintenance of the levels provided in the Treaty. In Article VIII is a provision that "A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement." Article IX provided:

"The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention."

To carry into effect this Convention of 1925, the Act of May 22, 1926 (44 Stat. part 2, p. 617) and an amendatory Act (Apr. 18, 1928, 45 Stat. 431) were passed. These two Acts provided that the Secretary of War should investigate and report to Congress on claims for damages caused, prior to acquisition of flowage easements under

this Act." The Secretary was required to acquire, by purchase or condemnation, "the flowage easements up to elevation one thousand and sixty-four sea level datum upon all lands in such State [Minnesota] bordering on the Lake of the Woods, Warroad River and Rainy River." Such condemnations were to be in accordance with the Act of August 1, 1888 (25 Stat. 357) and "with the constitutional provisions of the State of Minnesota, which provide that private property shall not be taken, destroyed, or damaged for public use without just compensation therefor first paid or secured."

Being unable to secure these flowage rights upon various tracts by purchase, a condemnation proceeding was instituted, which included lands owned by these appellants. Commissioners were appointed to assess damages to the several tracts sought to be condemned and reported damages as to each. Both the United States and each of these appellants appealed from the awards of the Commissioners. The appeals as to the tracts owned by these three appellants were, by agreement and order, consolidated for trial before a jury. From judgments of awards of damages as to the tracts owned by each of these appellants each of them has brought his separate appeal. They are consolidated for hearing and determination in this court.

But one main issue is involved in these appeals. It is raised in the record in various ways—by exclusion of evidence, refusal to charge and the charge to the jury. The issue is whether the use of these properties for flowage purposes is such a use as, under the circumstances here, can be considered as an element of that value for which compensation must be made. Appellants present their argument under three distinct points, each of which has the same purpose and effect—to allow compensation for this flowage use value.

Point I is that this reservoir or flowage easement was at the time of taking under this action and for years before had been an existing, established easement; that it was a "unit" of value of the land; that it was such "unit" alone which was taken and, therefore, that the *measure* of value for compensation should be the value of this taken unit and not the difference between the values of the entire tract before and after taking under this action. Point II is that, whatever *measure* of value (either the above unit or the above difference) be applied, the taking of this existing and established use is a proper element of value in damages and compensation because such use existed at, prior to and independent of this condemnation, is such as may be advantageously employed by others than this condemnor and is such as naturally would or actually has increased the market value of the

property. Point III is that the fair annual rental value of the flowage use is an element in compensation for taking of such use. All of these matters have been presented by counsel upon both sides with great ability and with commendable clearness and fairness. About all that could have been put before us, both for and against, has been presented and the Court has been materially aided thereby.

I.

The Unit Measure.

The brief of appellants reads: "Appellants urge that *compensation* for property taken, rather than *damage* to their remaining estate, be employed as the measure of their compensation, because it is more consistent with sound reasoning, and because it more clearly *points out* the error of the trial court"—that error being "the exclusion of all evidence of the most valuable use [flowage] which their property has served for thirty years and for which it is adaptable." The *discussion*, by appellants, of this urged measure of compensation may be helpful in scrutinizing the claimed erroneous action of the trial court by the vital inquiry under this "point" is whether "it is more consistent with sound reasoning" to employ this unit measure of value.

The reasoning of appellant is that the "orthodox method of assessing just compensation is to determine the value of the whole property before and after the taking and compute the difference"; that this method came into practice in condemnations of rights of way for roads or railroads under circumstances which did not require the taking of the entire property affected; that "a different rule obtains where the entire unit of property is taken"; that the unit rule applies "where the property taken is a separate unit or species of property, and is capable of being acquired and transferred independently of the land on which it may be located"; that "easements of all kinds are dealt with in the law as property, separate and distinct, just the same as any other item of property"; that the matter here dealt with is a "flowage easement"; that flowage rights and reservoirs are listed and valued for rate and taxation purposes, are sold and dealt in as separate units and conveyances thereof are recorded as such under the laws of Minnesota; that it is "good business and sound economics to treat storage reservoirs and flowage easements as separate units of property"; and that, as to this particular easement, it appears that it is a complete, existing unit of property and has been for thirty years, is being condemned for identically the same use it has served for that period, will be perpetually so used, the entire unit is taken and ap-

pellants have expressly waived all claim for damages to their remaining property.

In the examination of adjudicated cases, it is suggested that, as to some, there has been confusion and failure to distinguish "between *compensation for property taken* when it is all taken, and *damages to the remaining estate* when the property is not all taken." It is urged that here "all of the flowage rights, and all of the flowage property belonging to appellants is being taken, *and appellants have expressly waived all claims for damage to their remaining property;* also, that it is important to distinguish between easements long in existence and use before condemnation and easements brought into being by such proceedings."

"Sound reasoning", as employed here, must be understood, of course, in a legal sense. As to this, appellants properly admit that the "orthodox method of assessing just compensation is to determine the value of the whole property before and after the taking and compute the difference." However, they contend that "a different rule obtains where the entire unit of property is taken", that an entire unit of property is (in this sense) taken where it is "capable of being acquired and transferred independently of the land on which it may be located" and all of such unit is taken and that this easement is of that character.

It must be conceded that there are many kinds of easements which are capable of being acquired and transferred independently of the land on which they may be located. Also, that flowage easements are of that character. As to *all* of the flowage right (treated here as a "unit") being taken, the record does not support such assertion. It is clear that flowage rights are taken to the extent needed by this improvement but the record tends rather to support the view that there existed other flowage rights beyond (higher than) those taken—otherwise, why the provisions of the Treaty limiting the maximum flowage (Treaty and Protocol of February 24, 1925, Art. IV, VII, VIII, 44 Stat. 2108) and appointing a Control Board (Art. III, V) to supervise the water levels. At least it is certain there is no showing here that the maximum flowage level of this taking is the entire possible flowage level of the lands. Thus while it is not shown that all of the possible flowage rights of these lands are taken yet the situation is one of a flowage easement capable of separate acquisition and transfer. Does this situation bring this easement within a rule of separate unit valuation for condemnation purposes? Appellants cite *International Paper Co.* v. *United States,* 282 U. S. 399; *United States* v. *Cress,* 243 U. S. 316; *Carondelet Canal Co.* v. *Louisiana,* 233

U. S. 362, 388; *Adams* v. *C. B. & N. Ry. Co.*, 39 Minn. 286, 390, 39 N. W. 629; 1 Dunnell's Minn. Digest, Sec. 3057; 20 C. J. 593 and 20 C. J. 655. *International Paper Co.* v. *United States*, 282 U. S. 399, was a suit for damages by a lessee of water flowage right for the taking thereof. The only thing taken was the only thing owned by the plaintiff, to-wit, the right to water flowage under its lease. The "unit" was the subject of separate ownership by that plaintiff. *United States* v. *Cress* (also, *U. S.* v. *Kelly, et al.*), 243 U. S. 316, were cases for damages from flowage caused through water raised by dams. It was held (Cress case) that as to certain lands intermittently overflowed the taking constituted an easement (p. 329); that as to destruction of a ford and private right of way thereto recovery could be had therefor as damage *to the land to which it was appurtenant* (p. 329); that (Kelly case) the right to unobstructed flow away from a mill dam "is not a mere easement or appurtenance" and destruction of such right is "a taking of a part of the land" (p. 330). *Carondelet Canal & Navigation Co.* v. *Louisiana*, 233 U. S. 362, involved the question of impairment of a contract by State legislation. This depended upon whether a contract between the State and the Company provided for compensation by the State when it took over a canal and related works constructed and operated by the company for fifty years under the contract. No issue of eminent domain was involved. The expression in the opinion, intended by citation of appellants, is (p. 388):

"It may be that it did not own the canal, or the bayou or the old basin. Indeed, ownership of their soil was disclaimed at the bar. But, we repeat, there was valuable property which the statute contemplated could revert and could be compensated for. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312."

Here the entire property and *title* thereto was in the company, separate from the ownership of the land, and that entirety was the unit for which the company was entitled to compensation. *Adams* v. *C. B. & N. Ry. Co.*, 39 Minn. 286, 39 N. W. 629, was an action for damages to property through operation of a railway along the street in front. The holding was that plaintiff had an easement for light and air *to this lot* and, for deprivation thereof, he could recover damages *to the lot*. Dunnell's Digest, Sec. 3037, is a statement that "an easement is property and may be 'taken' within the meaning of the Constitution", citing the Adams case, *supra*. 20 C. J. 593, Section 83, and 655 Section 131 recognize easements appurtenant to land as property subject to eminent domain. The result of these citations is not to sustain the contention of appellants that where an easement is *cap-*

able of separate acquisition and transfer it is a unit for condemnation valuation purposes. The rule is that an easement is such unit only where, prior to condemnation, it has been severed *in ownership* from the fee (*International Paper Co.* v. *United States*, 282 U. S. 399). Even though the ownership of the easement has been severed from the ownership of the land upon which it is imposed, the easement is not such unit if it is appurtenant to—enjoyed in connection with—land of the owner of the easement. In such cases, the damage for taking is the injury to the land to which it is thus appurtenant (*United States* v. *Cress*, 243 U. S. 316, 329 (ford and right of way thereto); *United States* v. *Grizzard*, 219 U. S. 180, 185; *United States* v. *Welch*, 217 U. S. 333, 339). In the Welch case (p. 339) the Court said: "* * * the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached." This criterion of separate ownership is further illustrated in *Sharp* v. *United States*, 191 U. S. 341, 351-356, where several entirely separate tracts were owned by the same person and one only was taken and in *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, where several different character of ownerships endeavored to combine in seeking damages to the tract. In the latter case (p. 195) the Court said:

"But the Constitution does not require a disregard of the mode of ownership of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land."

Application of the above established principle to the situation here must result in ruling this "Point I" against appellants because there is here neither separate ownership nor separate tract of land taken.

II.

Flowage Use.

Appellants' second and main contention is that the flowage use of their lands for power reservoir purposes is an element of value proper to be considered in determining the damage from this taking. They contend that the uses to which land taken may be applied are properly and always considered as elements of value; that this flowage use existed at the time of this taking and had for years prior thereto; that such is the most valuable use of the lands and that such use naturally tends to and actually has affected the market value of these lands. The position of the Government is that all of the above con-

siderations are overridden for the reasons that any influence of flowage use on the value of these lands was impossible because the union of the properties necessary to this improvement was impracticable save by international agreement and eminent domain; because of the impossibility of obtaining authority to regulate lake levels for power purposes; because control of the lake outlets was necessary for any enjoyment of this use for power purposes and possibility of acquiring such control was removed by appropriation thereof by the Canadian Government, since 1898, for navigation purposes; and because the right of flowage upon these lands had been reserved by the United States in the laws under which these lands were opened for entry.

In so far as is necessary for a determination of this matter, the law applicable thereto is as follows. The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." "Compensation" means recompense or "equivalent" (*Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 326) to the owner and has no relation to advantage to the taker (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *McGovern* v. *N. Y.*, 229 U. S. 363, 371; *United States* v. *Grizzard*, 219 U. S. 180, 183; *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 343). "Just" means a fair money equivalent for what is taken—its fair money value. Where there is an actual current market value for things of the kind taken that, naturally, fixes the fair money value (*Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301; *United States* v. *New River Collieries Co.*, 262 U. S. 341; *Vogelstein & Co.* v. *United States*, 262 U. S. 337). However, most condemnations are of real estate or of interests therein where conditions as to valuation are different (*Sharp* v. *United States*, 191 U. S. 341, 349-350) and no such actual market value exists. However, "market value" is still the standard (*De Laval Co.* v. *United States*, 284 U. S. 61, 72; *McCoy* v. *Union Elev. R. R. Co.*, 247 U. S. 354, 365; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81; *United States* v. *Grizzard*, 219 U. S. 180, 183), but it must be determined otherwise than by current market prices. In such situations, the definition of market value is "the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy" (*De Laval Co.* v. *United States*, 284 U. S. 61; 73; *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123). The time for which the value is determined is the time of taking (*De Laval Co.* v. *United States*, 284 U. S. 61, 72; *Phelps* v. *United States*, 274 U. S. 341, 344; *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123, 125; *Vogelstein & Co.* v. *United States*, 262 U. S. 337; *Monongahela Nav.*

Co. v. *United States,* 148 U. S. 312, 341) and this is unaffected by an unlawful taking prior to and existing at the time of lawful taking (*Searl* v. *School District,* 133 U. S. 553). In using this defined standard no account is given to values or necessities peculiar to the seller (*Mitchell* v. *United States,* 267 U. S. 341, 344-345; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, 326), or the buyer (*United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 76; *McGovern* v. *N. Y.,* 229 U. S. 363, 371; *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195), but only such matters as would affect the ordinary seller and buyer in negotiating a fair price. In reality the result sought and reached is what the trier of fact finds is a fair sales value. To reach this result, such trier may consider all matters which would naturally influence agreement upon a price by sellers and buyers willing but not compelled to bargain. Obviously, the uses to which property may be put vitally affect its value. But "use" in this sense does not mean mere physical adaptability. A square block of firm land anywhere in the United States is physically adapted to support a towering office building but very few have any value for that purpose. It is *use adaptability* which concerns us. Since value is to be determined as of the time of taking, it is use adaptability apparent at that time. Since market value is the standard sought, it is use adaptability which would affect market value at the time of taking—that is, which would influence a seller and a buyer in arriving at a fair price then. The above considerations limit the uses which may be shown. Such uses include not only present use (*Phelps* v. *United States,* 274 U. S. 341, 344; *Mitchell* v. *United States,* 267 U. S. 341, 344-345; *Hanson Co.* v. *United States,* 261 U. S. 581, 590; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, 328-330) but other uses. The difficulty in many adjudicated cases has been to determine when potential uses may be shown. Since they must be such as would influence market value at the time of taking, the Supreme Court has ruled that they must be "probable * * within some reasonable time" (*Sharp* v. *United States,* 191 U. S. 341, 356-357) or "probably be desired and available for" (*United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 77) or "considerable enough to be a practical consideration and actually to influence prices" (*McGovern* v. *N. Y.,* 229 U. S. 363, 372), but cannot be such as are "speculative, remote, and not shown to be commercially practicable" (*United States* v. *Coronado Beach Co.,* 255 U. S. 472, 488) nor "too remote and speculative to have any legitimate effect upon valuation" (*McGovern* v. *N. Y.,* 229 U. S. 363, 372). Whether a potential use is such as may be shown within the above definition, naturally, depends largely upon the circumstances of each situation (*McGovern* v.

N. Y., 229 U. S. 363, 373) but one factor is "demand for the use" (*Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 328; *Kerr* v. *South Park Comm.*, 117 U. S. 379, 387). Also, and particularly pertinent to our case, where the use depends upon assembly of numerous tracts separately owned the probability of uniting or acquiring all of them necessary to the use is an important—maybe a controlling—consideration in determining whether the use is "too remote and speculative to have any legitimate effect upon the valuation" (*McGovern* v. *N. Y.*, 229 U. S. 363, 372 and see *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 80), and "In estimating that probability the power of effecting the change by eminent domain must be left out" (*McGovern* v. *N. Y.*, 229 U. S. 363, 372, and see *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 80-81). The things we deem material to bear in mind in the foregoing statement of the law are that existing uses influence values; that potential uses are not considered if they are remote and speculative; that they are remote and speculative if the use depends upon the union of numerous tracts, variously owned, and such union is improbable and that in determining such probability the power of eminent domain must be excluded.

With these matters in mind we turn to the facts here. Appellants press strongly the fact that this use at the time of and for years prior to the taking in this condemnation was an actual existing use. That is true. Was the use here of the character and within the proper intendment of the decisions or, outside of those decisions, is it logically to be regarded as a use which would influence market value of these lands. The decisions above cited as to actual use at the time of taking (and there are many others from various courts) all have to do with a use by the owner which would pass to a buyer of the land and of which the owner is deprived by the taking. The actual use here is through an unlawful trespass (*Secombe* v. *Railroad Co.*, 23 Wall. 108, 118.) This trespass established the physical adaptability of the lands for this flowage for power purposes. What effect had the establishment of such fact upon the sales value of the lands which would influence a seller and buyer of such at the time of this taking? For more than thirty years, these lands had borne the burden of this trespass to their detriment without hope of redress. There was no such hope because this trespass was occasioned by works erected in the outlet of the lake within a foreign territory by a foreign company acting under authority of the foreign government. During that entire time there could exist no value to the owner or to a prospective buyer in this use of flowage. It was a positive reducer of value. It rendered part of the land unfit for any purpose to the owner or such a buyer. Nor was there any hope of compensation for continued usage which

could possibly have added to the sales value of the land. It was a peculiar and unfortunate situation where the land owner was helpless. There was no demand for this use by anyone who would or could be made to compensate him therefor. It had been appropriated under circumstances which were beyond his power to remedy. Then there came a change. Opening the matter by the general Treaty of 1909, the Government sought to cure this unjust situation by the Convention of 1925. This it did by assuring the levels of the lake (the measure of intrusion upon the lands) and by voluntarily assuming to pay compensation therefor. It was not until the Convention of 1925 that there was any possibility of the landowner receiving *any* compensation for this taking of his land. Nor has there been before or since any possibility of any other demand for such use. In this situation (which existed at the time of this condemnation taking), it seems to us, justice to the landowner and to the public (1) would demand that this flowage use be excluded from estimation of sales value of the lands unless it can be seen that such use was properly an element of such value, irrespective of these actualities. In other words, if such use was properly an element of such value before this trespass then it continued to be such in spite thereof and should be taken into account—otherwise not. We think it should not be so regarded for the reasons following.

At the time of this taking by condemnation, the Lake of the Woods covered about 1,500 square miles. The shore line (main shore and islands) is estimated at 3,093 miles (United States 188, Canada 2,905) or 2,225 miles (United States 140, Canada 2,085). Lands affected by the condemnation flowage level comprise a great number of separate tracts variously owned. In Canada: 15,000 acres are owned by the Province of Ontario, 16,000 acres by the Dominion (in Manitoba), over thirty tracts are Indian reservations and there are 723 tracts privately owned. The Canadian public lands had been withdrawn from settlement some years with a view to this character of improvement. In the United States: the United States owned something less than 11,000 acres, the State of Minnesota owned one fair sized tract, 850 tracts were privately owned by about 775 owners with over 1,200 other persons having legal interests (mortgagees, etc.) therein. Added to the considerations of multiplicity of tracts and ownership, are the patent difficulties of successfully dealing with various governmental units and Indian tribes. To assemble all of this flowage affected land

(1). Compensation must be just not only to the landowner but to the public (Searl vs. School District, 133 U. S. 553, 562; Garrison vs. City of N. Y., 21 Wall. 196, 204) and all of the circumstances and elements at the time of taking must be considered (Brooks-Scanlon Corporation vs. United States, 265 U. S. 106, 123-124, 125-126).

would require acquisition of the rights of this great number of persons (including two Nations, one State, two Provinces, Indian Tribes and private persons) in this large number of separately and varrously owned tracts. We cannot think that such an eventuality held that degree of probability or possibility which could affect the value of these lands and be an influence or consideration affecting, in the slightest degree, the minds of sellers and buyers thereof in arriving at a fair price therefor. Such use is too remote and speculative to have such effect in fact and, therefore, can have none in law.

To this it may be said, that the rejected offer of proof was to show that prices had actually been so affected. That prices of these privately owned lands would be affected by the prospect of purchase or condemnation of the flowage rights under the Convention of 1925 is entirely probable and natural. Before that Convention, such a tract of land would be worth only its usage for agricultural or fishing purposes with the burden of the flowage actually there and the most which could be vaguely hoped for would be the removal of the flowage and the resultant use, for the above purposes, of the overflowed land. With the Convention came the certainty of compensation for the overflowed land. To the extent of this compensation, the value of the lands would be increased to the owner and, therefore, would be a factor in sales price thereof. Beyond this, there is no vestige of reason for an increase. Even if owners and buyers might actually have thought that this compensation would include an enhancement from use for flowage purposes, there was no justification in law for such view. Such thought could spring only from the Convention which had in mind this very improvement and values arising because of the particular improvement cannot be included in compensation (*McCoy* v. *Union Elev. R. Co.*, 247 U. S. 354, 366; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76, 77, 80; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 326; *Shoemaker* v. *United States*, 147 U. S. 282, 305; *Kerr* v. *South Park Comm.*, 117 U. S. 379, 386, 387). Also, this Convention clearly provided for accomplishment of acquisition through eminent domain and where the use is possible only through the exercise of that power, "it must be left out" (*McGovern* v. *N. Y.*, 229 U. S. 363, 372) in estimating the probability of such a use as affecting sales value and compensation. With no further examination of the difficulties urged by appellee, we think the trial court correctly excluded consideration of this flowage use as an element of value.

III.

Rental Value.

In view of what has been above determined as to "Point II", little need be said as to the contention of appellants that the annual rental

value of this flowage use was improperly denied consideration. This suit is not concerned with compensation for the use of flowage rights *prior* to the taking under this condemnation. That is a different situation under rules of law (*Secombe* v. *Railroad Co.*, 23 Wall. 108, 118; *Searl* v. *School District*, 133 U. S. 553, 564) and, under the Convention of 1925, Art. IX, is to be cared for by a separate and different method. The problem in this action is whether flowage use value is a proper element of sales-market-value to be considered in determining the compensation due the landowners. If (as we have above held) this use cannot be properly considered, it is obvious that we are not concerned with any method of estimating the value of such denied use. Annual rental value thereof has no other purpose either in fact or in the decisions cited by appellants.

CONCLUSION.

The judgments must be and are *Affirmed.*

Filed August 17, 1933.

BOOTH, Circuit Judge, dissenting.

With great reluctance I find myself unable to agree with the opinion of the majority of the Court. The main issue in the cases is thus clearly stated in the majority opinion:

"The issue is whether the use of these properties for flowage purposes is such a use as, under the circumstances here, can be considered as an element of that value for which compensation must be made."

Two incidental questions are discussed in the majority opinion. I shall pass them by, as I do not think they are of decisive importance.

The crucial question is, in my judgment, whether the use of the land for reservoir or flowage purposes is a proper element to be considered in determining the compensation to be made in the condemnation proceedings.

The majority opinion contains the following:

"Appellants press strongly the fact that this use at the time of and for years prior to the taking in this condemnation was an actual existing use. That is true. Was the use here of the character and within the proper intendment of the decisions or, outside of those decisions, is it logically to be regarded as a use which

would influence market value of these lands. The decisions above cited as to actual use at the time of taking (and there are many others from various courts, all have to do with a use by the owner which would pass to a buyer of the land and of which the owner is deprived by the taking. The actual use here is through an unlawful trespass (*Secombe* v. *Railroad Co.*, 23 Wall. 108, 118.) This trespass established the physical adaptability of the lands for this flowage for power purposes. What effect had the establishment of such fact upon the sales value of the lands which would influence a seller and buyer of such at the time of this taking? For more than thirty years, these lands had borne the burden of this trespass to their detriment without hope of redress. There was no such hope because this trespass was occasioned by works erected in the outlet of the lake within a foreign territory by a foreign company acting under authority of the foreign government. During that entire time there could exist no value to the owner or to a prospective buyer in this use of flowage. It was a positive reducer of value. It rendered part of the land unfit for any purpose to the owner or such a buyer. Nor was there any hope of compensation for continued usage which could possibly have added to the sales value of the land. It was a peculiar and unfortunate situation where the land owner was helpless. There was no demand for this use by anyone who would or could be made to compensate him therefor. It had been appropriated under circumstances which were beyond his power to remedy. Then there came a change. Opening the matter by the general Treaty of 1909, the Government sought to cure this unjust situation by the Convention of 1925. This it did by assuring the levels of the lake (the measure of intrusion upon the lands) and by voluntarily assuming to pay compensation therefor. It was not until the Convention of 1925 that there was any possibility of the land owner receiving *any* compensation for this taking of his land."

I cannot agree with some of the ultimate facts and legal conclusions contained in the foregoing statement of the situation, and cannot agree with the conclusions of the majority opinion that flowage use should be excluded from an estimation of sales value of the lands.

The situation, as I think the record discloses, at the time of the present condemnation proceedings in 1929 was substantially as follows:

(1) Both the building of the Rollerway dam in 1887 and the building of the Norman dam in 1895-98 had produced trespasses by

flowage upon the lands here involved. These trespasses were committed either by private parties or by private parties jointly with the Canadian government. They continued down to the time of the present condemnation proceedings. These trespasses are conceded in the majority opinion; and it is further conceded that these trespasses established the physical adaptability of the lands for flowage purposes.

The adaptability for flowage use may not be an element of value; but the adaptability when utilized for such flowage use may contribute to the land a very material element of value.

In the cases at bar we have the adaptability. We also have the utilization of the adaptability. Both are conceded.

(2) But it is argued in the majority opinion, if I understand it, that the utilization of the adaptability does not contribute to the land any element of value because the utilization was a trespass and there was no hope of recovery for the trespass. This, I think, is erroneous.

As early as 1895, complaints were made by the owners of lands in the United States bordering on the lake that their lands were being overflowed as the result of the dams mentioned. These complaints were made to the United States Government, but they were not brought to the attention of the Canadian Government. A fair inference from the record is that the reason for this inaction was not because the trespass which was being committed was one for which there was no redress, but because the United States Engineers were of the opinion that the flooding complained of was produced not by the dams mentioned, but by natural causes. In other words, the United States Engineers labored under a mistaken belief as to the correct location of the high water mark of the Lake of the Woods in its natural state. The complaints of the landowners, however, continued, and attorneys were employed, but it was not until the International Joint Commission made its final report on the Lake of the Woods in 1917 that it was conclusively proven that the landowners were right and the United States Engineers were wrong, and that the Rollerway dam and the Norman dam had raised the level of the lake several feet above its level in its natural state.

The fundamental fact upon which a claim for damages by reason of flowage must rest was thus established after about twenty-two years of trespass had elapsed.

This finding of the International Joint Commission did not create a cause of action in behalf of the landowners; it simply furnished proof of one of the facts to establish such cause of action.

The cause of action existed long prior to the Treaties of 1909 and of 1925; and the cause of action was of recognized value long before the condemnation proceedings were begun. This is shown by the record.

Article II of the Treaty of 1909 (36 Stat. 2448, 2449) provides that "any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs".

The International Joint Commission also recognized the value of the flowage use. In its report it said:

"Maintaining the lake at a low level is clearly uneconomical, even from the viewpoint of the agricultural interests; and when the other interests involved are considered, it becomes appparent that, looking to the uses that will procure the best results, riparian lands are more valuable for flowage purposes than for agricultural purposes."

Article IX of the treaty of 1925 (44 Stat. 2108, 2110) recognized that the cause of action for trespass by past overflow was not of chimerical value. That Article provided:

"The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom."

Article X of said treaty provided (p. 2111):

"The Governments of the United States and Canada shall each be released from responsibility for any claims or expenses arising in the territory of the other in connection with the matters provided for in Articles VII, VIII, and IX."

And the Act to carry into effect the provisions of the treaty of 1925 (44 Stat. 617) contained the following:

"Sec. 3. The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants * * *."

It is thus apparent that a flowage use value of the lands in controversy existed long prior to the treaty of 1925, and that such flowage use value was finally recognized by both the United States and the Canadian Governments; and that such flowage use value was actual and not chimerical and that it existed prior to and independently of any condemnation proceedings.

(3) Nor was the situation of the landowner as to recovery of such flowage use value as damages from the trespassers one of mere hopeless speculation. Were this the case, it would be a reproach to both Governments concerned. On the contrary, it is, in my opinion, a reasonable and safe conclusion that once the facts were established, the landowner could get compensation in damages in the courts of Canada, if the trespass had been committed by private parties; and probably could obtain compensation by Petition of Right, if the flowage use had been taken by authority of the Canadian Government (See *Halsbury's Laws of England*, Vol. 1, p. 17, paragraphs 21, 22, 23 and 24; and Vol. 10, pp. 26-30; also Vol. 2 D. L. R. [1928], p. 625, annotation "Petition of Right" by Arthur S. Bourinot); and certainly he could obtain redress through diplomatic action between the two Governments.

Such, substantially, was the situation, in my judgment, when the present condemnation proceedings were brought.

The amendatory Act of Congress for carrying into effect the provisions of the treaty of 1925 (45 Stat. 431) provides that condemnation proceedings shall be "in accordance with the constitutional provisions of the State of Minnesota".

Section 13 of Article I of the Constitution of the State of Minnesota provides:

"*Private property for public use*—Private Property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured."

What constitutes "private property" within the meaning of the State Constitution has been passed upon many times by the Minnesota State Supreme Court.

In *Adams* v. *Chicago, Burlington & Northern R. Co.,* 39 Minn. 286, 39 N. W. 629, the Court, in discussing the constitutional provision, said (p. 290):

"All property, whatever its character, comes within its protection. It is hardly necessary to say that any right or interest in land in the nature of an easement is property, as much so as a lien upon it by mortgage, judgment, or under mechanic's lien laws. If a man is deprived of his property for the purpose of any enterprise of public use, it must be a taking, even though the right of which he is deprived is not and cannot be employed in the public use."

This rule has been followed in numerous cases, among them: *Minneapolis, St. P., R. & D. Elec. T. Co.* v. *Searle,* 208 F. 122 (CCA 8); *Lamm* v. *Chicago, St. Paul, Mpls. & Omaha Ry. Co.,* 45 Minn. 71; *Gustafson* v. *Hamm,* 56 Minn. 334.

And the Courts of Minnesota have been liberal in admitting testimony as to the value of private property taken. *Duluth & Winnipeg R. Co.* v. *West,* 51 Minn. 163; *Cedar Rapids, etc., Ry. Co.* v. *Ryan,* 37 Minn. 38; *Russell* v. *St. Paul, Mpls. and Man. Ry. Co.,* 33 Minn. 210; *King* v. *Mpls. Union Ry. Co.,* 32 Minn. 224; *Sherman* v. *St. Paul, Mpls. & Man. Ry. Co.,* 30 Minn. 227; *Colvill* v. *St. Paul & Chicago Ry. Co.,* 19 Minn. 283; *Weaver* v. *Mississippi & Rum River Boom Co.,* 28 Minn. 534.

In the case last cited, the Court, speaking by Justice Mitchell, said:

"No principle is more fully implanted in American constitutional law than that private property shall not be taken for public use without compensation; and, in view of the fact that the government is granting so much of its prerogative franchise to private or *quasi* public corporations, in theory for public purposes, but often practically in part for private benefit, the exercise of which involves injury to, or the taking of, private property, there is no constitutional guaranty that requires to be more jealously guarded against encroachment than the one referred to."

In the Russell case the Court said (p. 213):

"Any existing facts which enter into the value of the land in the public and general estimation, and tending to influence the minds of sellers and buyers, may be considered."

The same liberal rule has been followed by the Supreme Court of the United States. The case of *Boom Co.* v. *Patterson*, 98 U. S. 403, is quite pertinent to the cases at bar. In the Patterson case a Boom Company sought to condemn three small islands in the Mississippi River so situated with reference to each other and the river bank as to be peculiarly adapted to form a boom a mile in length. The question in the case was whether their adaptability for that purpose gave the property a special value which might be considered. The Supreme Court held that the adaptability of the land for the purposes of a boom was an element which should be considered in estimating the value of the lands condemned, and the Court said, relative to the rule for estimating damages (p. 408):

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps imposssible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

The same liberal tendency in the admission of evidence in condemnation cases is shown in an exhaustive opinion by Judge Gardner of this Court in the recent case of *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. (2d) 297.

It should be kept clearly in mind that the testimony sought to be introduced in the cases at bar, but excluded, was not offered for the purpose of obtaining damages for past trespass, but solely for the purpose of establishing an existing and established element of value of the land, to be considered by the jury in fixing the compensation for the acquirement of a flowage easement for the future; and, further, that the testimony sought to be introduced, but excluded, was not offered for the purpose of establishing a value of the flowage use which had come into existence by reason

of the commencement of the condemnation proceedings. The testimony was proffered for the purpose of establishing the value of a flowage use which had existed for many years and which value was claimed to be an important element in the total value of the particular land taken.

In addition to proof of the adaptability of the lands involved for flowage or reservoir use, and of the actual use of said lands for said purpose for many years, the landowners offered to prove that shore lands similar to those involved had been purchased long prior to the present condemnation proceedings because of their use for storage or reservoir purposes; and that larger prices were paid for such lands for that reason; that the conditions affecting the Lake of the Woods, and existent before the condemnation proceedings were commenced, were such as would naturally affect the market value and market price of shore lands; that the market value and market price of shore lands similar to those involved were in fact affected by their adaptability for use, coupled with actual use for flowage or reservoir purposes; that it was reasonably certain that the interests controlling the power projects below the outlet of the lake would seek to acquire flowage rights had not the treaty of 1925 been made; that there was competition between Ontario interests and Winnipeg interests in regard to the acquirement and control of the Lake of the Woods reservoir; that such flowage rights had a well-recognized rental value; and the amount of such rental value.

Deeds were offered, but excluded, which conveyed similar lands bordering on Lake of the Woods and which contained a reservation in the grantor of any right to past damages by reason of wrongful flowage of said lands.

All of the testimony along the lines mentioned and similar lines was excluded on the grounds that it was too speculative, did not go to the true measure of damages; and on various other similar grounds.

The Government contended, among other things, that before flowage or reservoir use of said shore lands could be an element of value of said lands, there would have to be a unification of the many titles to the shore lands and a control of the waters of said lake.

It seems to me that the question is one of fact whether the adaptability for reservoir or flowage purposes coupled with the long-

continued actual use for such purposes entered into the value of such lands or not. Whether such element of value would have been greater if the titles to the various parcels had been unified is not material; nor is it material whether or not there *should have been logically* no element of value in the lands based upon adaptability and use for reservoir purposes until the titles were unified. Unification of the titles may have been somewhat impracticable, but co-operation between the various owners including the United States and Canada (even by acquiescence) as to maintenance of lake levels was not impossible, but an established fact, even though the exact extent of the co-operation was not definitely fixed.

The question whether the adaptability, coupled with the actual use, did in fact enter into the value of the lands was, in my opinion, for the jury, and the question should have been submitted under proper instructions.

There is no point raised as to the sufficiency of the offers to prove; and the charge of the Court was explicit. It read:

"In computing the fair market value, both before and after the imposition of the easement, you will take into consideration all of the uses for which the property was available on May 4th, 1929, and May 5th, 1929, and determine what use it was most valuable for, and base your award thereon; but you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for those purposes that you are to value these lands."

The offers to prove, the rulings thereon, and the charge of the Court were all made pursuant to an agreement by Court and counsel that the crucial question should be raised and embodied in the record by offers to prove and by charge of the Court, as the clearest and most concise way of presenting the question to the appellate Court.

The rulings of the Court on the offers to prove and the charge of the Court were, it seems to me, contrary to the spirit, if not to the express provisions, of the treaty of 1925 and the Act of Congress for carrying it into effect.

The treaty provides (Article IX, *supra*):

"The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom."

The statute above quoted (44 Stat. 617) provides for an ascertainment of damages to the landowners by reason of flowage prior to the treaty.

The rulings of the Court on the offers to prove and the charge of the Court, however, held in effect that as a matter of law there could be no such damages.

The cases of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *McGovern* v. *New York*, 229 U. S. 363; and *New York* v. *Sage*, 239 U. S. 57, relied upon by the appellee, lend support rather to the contentions of appellants in the cases at bar, when comparison is made between the facts disclosed in those cases and the facts disclosed in the cases at bar.

In the Chandler-Dunbar case, the Court said (p. 76):

"The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose." (Citing the case of *Boom Co.* v. *Patterson, supra.*)

In the McGovern case there had been no prior actual use of the land for a reservoir site (the purpose for which the land was being condemned) and the Court held that the landowner could not recover as damages for the taking of his land any part of the enhanced value thereof due to the condemnation proceeding.

In the Sage case there had been no prior actual use of the land for a reservoir site (the purpose for which the land was being condemned) and the Court followed the holding in the McGovern case.

In the cases at bar it was conceded that at the time of the condemnation proceedings and for many years prior, the lands sought to be taken had an actual, as distinguished from a potential use, for flowage or reservoir purposes; and the offers to prove tended to show that this actual use at the time of the condemnation proceedings and for years prior thereto had a value; and the offers to prove tended also to show that at the time of the condemnation proceedings and for years prior thereto this use value was an element entering into the value of the lands here involved.

For the reasons outlined above, I am of the opinion that the proffered evidence along the above mentioned lines should have been received, and that the charge of the Court, above quoted, was erroneous.

I think the judgments should be reversed.

Filed August 17, 1933.

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445 (Judgment in Cause No. 9279.)

United States Circuit Court of Appeals
Eighth Circuit.

May Term, 1933.

Monday, August 21, 1933.

Elias A. Olson, Appellant,
No. 9279. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

August 21, 1933.

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446 (Judgment in Cause No. 9280.)

United States Circuit Court of Appeals
Eighth Circuit.

May Term, 1933.

Monday, August 21, 1933.

Randor G. Karlson, Appellant,
No. 9280. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

August 21, 1933.

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447 (Judgment in Cause No. 9281.)

United States Circuit Court of Appeals
Eighth Circuit.

May Term, 1933.

Monday, August 21, 1933.

Harry Brewster, Appellant,
No. 9281. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

August 21, 1933.

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448 (Clerk's Certificate.)

United States Circuit Court of Appeals
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein Elias A. Olson was Appellant and the United States of America was Appellee, No. 9279, and wherein Randor G. Karlson was Appellant and the United States of America was Appellee, No. 9280, and wherein Harry Brewster was Appellant and the United States of America was Appellee, No. 9281, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-second day of September, A. D. 1933, mandates were issued out of said Circuit Court of Appeals in each cause, directed to the Judges of the District Court of the United States for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of October, A. D. 1933.

E. E. KOCH,
Clerk, U. S. Circuit Court of Appeals for the Eighth Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 580

ORDER ALLOWING CERTIORARI—Filed December 11, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 581

ORDER ALLOWING CERTIORARI—Filed December 11, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 582

ORDER ALLOWING CERTIORARI—Filed December 11, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.